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NEW YORK (STATE) Laws, statutes, etc.

WORKMEN'S COMPENSATION LAW

RULES OF INDUSTRIAL BOARD

RULES OF INDUSTRIAL COMMISSIONER RELATIVE TO MEDICAL CARE OF INJURED EMPLOYEES

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INTRODUCTION

History.—The Workmen's Compensation Law, L. 1913, ch. 816, had been in effect twenty-seven years on the first day of July, 1941, administered by the Workmen's Compensation Commission during the first eleven months and, thenceforth, by the Department of Labor. The general organization and functions of the Department of Labor relative to workmen's compensation are prescribed in Article 2 of the Labor Law, L. 1921, ch. 50, effective March 9, 1921, as amended by later acts.

In addition to the re-enacting act, L. 1914, ch. 41, effective March 16, 1914, two hundred and three later acts have amended the Workmen's Compensation Law. A table of these amendatory acts down until January, 1942, with the dates of their going into effect, follows § 141, below, pages 294, 295. They have been editorially reviewed year by year and their texts, showing changes by italics and brackets, presented in the Department's twenty-seven Special Bulletins, Nos. 72, 78, 84, 88, 94, 99, 107, 111, 119, 125, 135, 145, 151, 155, 159, 165, 169, 174, 180, 184, 186, 187, 192, 200, 203, 205 and 209.

The original Workmen's Compensation Law of New York, L. of 1910, ch. 674, was declared unconstitutional in Ives v. South Buffalo Ry. Co., 201 N. Y. 271, and was repealed by this act (§ 140). An unused voluntary plan of workmen's compensation, L. 1910, ch. 672, still stands on the statute books as part of the Employers' Liability Law, L. 1921, ch. 121.

Notes and Index.—In this edition a reference in italics to all amendatory acts follows each amended section or subdivision and the numbered notes show the wording of amendments for 1922 and succeeding years. The numbered notes to the edition of 1921 show the wording of amendments for all years prior to 1922.

A general index appears at the end. An alphabetical arrangement of the employments covered by the law appears in subdivision 1 of section 3.

Interpretation.—Notes following the numbered notes cite provisions of law, court decisions and Attorney-General's opinions to date. Special Bulletins, Nos. 81, 87, 95, 97, 98, 106, 114, 118, 123, 133, 140, 149, 156, 161, 177, 185, 188 and 204 issued by the Division of Statistics and Information of the Department of Labor, notice all court decisions and present the full texts of all court and Attorney-General's opinions relative to workmen's compensation from July 1, 1914, to September 1, 1940. The abbreviated reference to these Special Bulletins, S. B., is used herein. Thus, the citation for Special Bulletin, No. 81, page 290, is 81 S. B. 290. Special Bulletin No. 162 is a General Outline and Index to the fourteen Special Bulletins in the series, 81 to 161, enumerated above, and to the monthly Industrial Bulletin's reviews of opinion cases later than those in 161 until September 1, 1930. It supersedes Special Bulletin No. 124.

The texts of court opinions and decisions are also to be found in the New York Reports, the Appellate Division Reports and the Miscellaneous Reports

under the citations given herein. The Reports of the Attorney-General contain occasional compensation opinions. These are appended to the Industrial Commissioner's annual reports. Beginning with September, 1922, the monthly Industrial Bulletin of the Department has reviewed court opinions and decisions in New York compensation cases. The abbreviated reference to it, Ind. Bul., is used herein. For the period, October, 1915, to October, 1921, the monthly Bulletin of the Department of Labor, predecessor to the present Industrial Bulletin, and the State Department Reports, issued semimonthly by the Miscellaneous Reporter, give the texts of many of the Department's compensation findings and conclusions and of the Attorney-General's compensation opinions. The abbreviated references to these two earlier sources, Bul., and S.D.R., are used herein.

Constitutionality.—This New York Workmen's Compensation Law has been declared constitutional by the Supreme Court of the United States: New York Central R. R. Co. v. White, 243 U. S. 188; 87 S. B. 11. Its constitutionality had previously been upheld by the Court of Appeals of New York in Jensen v. Southern Pacific Co., 215 N. Y. 514; 81 S. B. 22, and Walker v. Clyde Steamship Co., 215 N. Y. 529; 81 S. B. 29.

Construction.—The Workmen's Compensation Law should be construed broadly and liberally: Matter of Petrie, 215 N. Y. 335; 81 S. B. 290; Costello v. Taylor, 217 N. Y. 179; 81 S. B. 183; Winfield v. N. Y. C. & H. R. R. Co., 168 App. Div. 351; 216 N. Y. 284; 81 S. B. 168; Moore v. Lehigh Valley R. R. Co., 169 App. Div. 177; 217 N. Y. 27; 81 S. B. 199; Rheinwald v. Builders' Brick and Supply Co., 168 App. Div. 425; 81 S. B. 59; McQueeney v. Sutphen & Myer, 167 App. Div. 528; 81 S. B. 392; Allied Mutuals Ins. Co. v. De Jong, 209 App. Div. 505; 133 S. B. 48.

Interstate Commerce Jurisdiction.—The Constitution and laws of the United States exclude State Workmen's Compensation Laws from coverage of accidents occurring to railroad employees in interstate commerce. The theory of the relative spheres of the Federal and State governments under the commerce clause of the Federal Constitution is that the States occupy the field of interstate commerce except in so far as the United States, by congressional legislation, has dispossessed them. The Federal Employers' Liability Act has dispossessed the States of the power to compensate accidents to railroad employees injured in interstate commerce: New York Central R. R. Co. v. Winfield, 244 N. Y. 147; 87 S. B. 291. But the States may compensate accidents in interstate commerce to employees other than railroad employees in the absence of congressional legislation prescribing employers' liability relative to such other employees. For example, express companies and sleeping car companies, not being subject to the Federal Employers' Liability Act, are subject to state workmen's compensation laws: Wells Fargo & Co. v. Taylor, 254 U. S. 175; 133 S. B. 142; Bryant v. Pullman Co., 228 N. Y. Rep. 579; 95 S. B. 221; Freitag v. American Express Co., 30 S. D. R. 444; 209 App. Div. 233; 133 S. B. 102; also motor vehicle companies, Smith v. Lavine, Inc., 231 App. Div. 774; 177 S. B. 51. The Federal Longshoremen's and Harbor Workers' Compensation Act excludes the Federal Employers' Liability Act relative to injury of a railroad employee upon a car float or other vessel: Nogueira v. N. Y., New Haven & Hartford R. R. Co., 281 U. S. 128; 177 S. B. 229.

Relations of the Federal Safety Appliance Act and the New York Work-

men's Compensation Law have been interpreted in Ward v. Erie R. R. Co., 230 N. Y. 230, reversing 185 App. Div. 841; 133 S. B. 154; and Gilvary v. Cuyahoga Valley Ry. Co., 292 U. S. 57; 188 S. B. 137–139.

If an accident to a railroad employee does not occur in interstate commerce, as is often the case, the state workmen's compensation law applies. The courts have handed down a large number of compensation decisions the combined effect of which is to draw the line between accidents to railroad employees occurring in interstate commerce and accidents to railroad employees not occurring in interstate commerce. Of these, United States Supreme Court decisions in New York cases are: New York Central R. R. Co. v. White 243 U. S. 188, 207; 87 S. B. 11; N. Y. Central R. R. Co. v. Porter, 249 U. S. 168; 97 S. B. 227; New York Central R. R. Co. v. Marcone, 281 U. S. 345; 177 S. B. 233; and N. Y., New Haven & Hartford R. R. Co. v. Bezue, 284 U. S. 415; 177 S. B. 243; and, in Illinois cases, are: Chicago & Northwestern Ry. Co. v. Bolle, 284 U. S. 74; 177 S. B. 239, and Chicago & Eastern Illinois R. R. Co. v. Industrial Comn. of Illinois, 284 U. S. 296; 177 S. B. 241. For full citation of New York workmen's compensation opinions and decisions on interstate commerce, consult 162 S. B. 90–94, 177 S. B. 300, 188 S. B. 133–139, and 204 S. B. 560–565. See also § 113, below, and notes thereunder.

The Federal Employers' Liability Act was amended (Public Act No. 382—76th Congress, approved August 11, 1939) so as to provide that any employee of a common carrier any part of whose duties is in furtherance of interstate or foreign commerce, or which directly or closely and substantially affects such commerce, shall be considered as being employed by the carrier in such commerce and entitled to the benefits of the Liability Act. This amendment was interpreted in Ermin v. Pennsylvania R. R. Co., District Court, E.D., New York, 36 Fed. Supp. 936, 941, in which a brakeman, member of a shifting crew engaged in moving dead engines from one place to another in the same State for repair, sustained injuries. These engines had been and following necessary repair were to be used in interstate commerce. The brakeman instituted action for injuries under the Federal Employers' Liability Act. Question was whether or not said brakeman at time of the accident was employed in interstate commerce within the purview of the Federal Employers' Liability Act as amended by Act of Congress approved August 11, 1939. The United States District Court held that said brakeman at time of the accident was engaged in interstate commerce. The Court stated that "It was the intent of the lawmakers to bring within the scope of the Federal Employers' Liability Act all employees whose work at the time of injury was not in actual interstate transportation or a part of it, but any part of whose work was in furtherance of interstate commerce, or in any way affected such commerce directly, closely and substantially."

Admiralty Jurisdiction.—The admiralty or maritime jurisdiction of the United States covers navigable waters, craft capable of and designed for navigation of such waters and the execution of contracts pertaining to such waters and craft. Waters which form a continued highway for interstate or international commerce are navigable waters: The Montello, 20 Wall. (U. S.) 430. They include, as concerns New York, the Hudson, Saint Lawrence and Niagara Rivers, Lakes Erie and Ontario, and the streams and lakes within the State that are commercially tributary to them, including

the canals. These are all within the admiralty jurisdiction of the United States. They are subject to such compensation legislation as Congress alone may enact. For cases in which the question of admiralty jurisdiction figured, see § 113, below, and notes thereunder.

On March 4, 1927, the President of the United States approved a law of Congress entitled "Longshoremen's and Harbor Workers' Compensation Act," which grants federal compensation to longshoremen, carpenters and others who board vessels in the course of their employment and are accidentally injured while upon or in navigable waters. The same workers when injured upon docks or other land borders of navigable streams in the course of their maritime work must look to state law for workmen's compensation: State Industrial Comn. of New York v. Nordenholt Corp., 259 U. S. 263; 118 S. B. 196. Their water compensation is in some respects more liberal than their land compensation. The federal compensation act is modeled upon the New York Workmen's Compensation Law. It excludes from its coverage public officers and employees, the masters and crews of all vessels and all workers, longshoremen or others, who may be loading, unloading or repairing small vessels under eighteen tons net; so that there remain maritime accidents which compensation does not reach. Workmen's compensation and admiralty aspects of a federal project for improvement of Niagara river navigation are set forth in Opinion of Attorney-General, April 7, 1934. The federal compensation act is administered generally by the United States Employees' Compensation Commission and locally by a dozen or more deputy commissioners. The Supreme Court of the United States has upheld its validity with opinion: Crowell v. Benson, 285 U. S. 22; 177 S. B. 269; and the Court of Appeals of New York, without opinion: Chernik v. Clyde S.S. Co., 248 N. Y. Rep. 508; 161 S. B. 88; the United States Supreme Court has denied writ of certiorari in the case, 278 U. S. 637, October 22, 1928. It is the third and the successful attempt of Congress to solve the vexed problem caused by the exclusiveness of federal admiralty jurisdiction, two previous Acts of Congress attempting to apply state workmen's compensation laws to accidents in admiralty having been declared unconstitutional by the United States Supreme Court, the earlier in Knickerbocker Ice Co. v. Stewart, 253 U. S. 114; 106 S. B. 15; and the later in State of Washington v. Dawson and Industrial Accident Comn. of California v. Rolph Co., 264 U. S. 219; 133 S. B. 13. The State Insurance Fund may issue policies covering maritime hazards under the federal act: Workmen's Compensation Law, § 76. Text of the federal act is in 151 S. B. 51–70. Sketches of it, historical and comparative, are in the monthly Industrial Bulletin of the New York Department of Labor, May, 1927, at page 212, and the monthly Labor Review of the U. S. Department of Labor, April, 1927, at page 18.

A federal district court should not enjoin enforcement of a compensation award if the amount involved does not exceed $3,000: Northern Pacific S. S. Co. v. Soley, 257 U. S. 216; 118 S. B. 219.

Section 113 of the Workmen's Compensation Law provides that claimant, employer and carrier may unitedly waive admiralty or interstate commerce rights in compensation cases. Mere participation in compensation proceedings does not constitute waiver: Fitzgerald v. Harbor Lighterage Co., 244 N. Y. 132, 156 S. B. 140. The Court of Appeals has dismissed appeal in an old case where the Appellate Division affirmed an award with state-

ment that this waiver provision is procedural and therefore retroactive in effect: Kane v. Morse Dry Dock & Repair Co., 250 App. Div., 888; 277 N. Y. Rep. 533; 204 S. B. 560. The Appellate Division, Second Department, had declared this provision invalid in Christensen v. Morse Dry Dock & Repair Co., 216 App. Div. 274; 149 S. B. 115; the Supreme Court, New York County, in the First Department, had decided to the same effect in Argentino v. Jarka Co., 126 Misc. 816; 149 S. B. 123; both decisions were with opinion; on the other hand, the Appellate Division, Third Department, had upheld the waiver provision in McEntee v. City of New York, 3 Ind. Bul. 101; 30 S. D. R. 374; 207 App. Div. 878; 133 S. B. 21, an earlier decision without opinion, and the Supreme Court, First Department, with opinion, had upheld an action under § 29 of the Workmen's Compensation Law based on waiver; Lumber Mutual Casualty Co. v. Thompson, 134 Misc. 370; 137 Misc. 379; affd. 234 App. Div. 841; 177 S. B. 266–268. The Court of Appeals has held that acceptance of workmen's compensation by an employee injured under admiralty jurisdiction, being an accord and satisfaction, destroys his admiralty right: Brassel v. Electric Welding Co., 239 N. Y. 78; 133 S. B. 168; Larsey v. Hogan & Sons, 239 N. Y. 298; 156 S. B. 138; Holland v. Atlantic Stevedoring Co., 239 N. Y. Rep. 605; 133 S. B. 163; but the employee must fully understand what he is doing: Anderson v. N. Y., Ontario & Western Ry. Co., 253 N. Y. Rep. 570; 9 Ind. Bul. 301. The Appellate Division, Second Department, has suggested in its opinion in the Christensen case, above, that an employee may give a general release of his admiralty right as a basis of agreement for compensation. For a discussion of the question of state jurisdiction in old cases in which compensation had been paid over a period of years, see Opinion of Attorney-General, April 30, 1936, and Kane v. Morse Dry Dock & Repair Co., 250 App. Div. 888; 277 N. Y. Rep. 533; 204 S. B. 560.

History of the New York Legislature's attempts to solve the admiralty problem and review of court decisions on admiralty until September, 1940, are in 81 S. B. 160, 161, 181, 182; 87 S. B. 320–379; 97 S. B. 17, 18, 65, 243–259; 106 S. B. 14-23, 270-286; 118 S. B. 194-224; 133 S. B. 157-169; 140 S. B. 106-112; 149 S. B. 110-125; 156 S. B. 130-143; 161 S. B. 88-92; 177 S. B. 252–268; 188 S. B. 140–157; 204 S. B. 553–560. The United States Supreme Court affirmed the New York Court of Appeals' judgment in the "Observation" explosion case, 188 S. B. 147: Carlin Construction Co. v. Heaney, 299 U. S. 41; 204 S. B. 553; a similar "Observation" case is Dingfeldt v. Albee Godfrey Whale Creek Co., 272 N. Y. 623; petition for rehearing denied, 301 U. S. 687, 715; 204 S. B. 555.

Places Owned or Occupied by the United States.—Subdivision 17 of Section 8 of Article I of the Constitution of the United States declares that Congress shall have power to exercise exclusive jurisdiction over the District of Columbia and "over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful buildings." There are more than two hundred such places in the State of New York. They range in size from West Point Military Academy's extensive lands to tiny beacon sites in rivers and along shores. They include post-offices in several New York cities. A list of them is in the "State Law," Chapter 57 of the Consolidated Laws. Congress, by Act approved June 25, 1936, has extended

the jurisdiction of the Workmen's Compensation Law of New York to these places. Such Act does not extend the law's jurisdiction to accidents to traveling New York employees in federal places within other States. The jurisdiction of New York's Workmen's Compensation Law extends to all places within or without New York State that are owned or occupied by the United States by methods other than that of the Federal Constitution's provision, such as conquest, purchase or eminent domain. For review of the subject, including texts of cases and the Federal Act, see 188 S. B. 158-166 and 204 S. B. 565, 566.

This revised and reannotated edition of the Workmen's Compensation Law has been prepared by A. I. Lieberman, Labor Law Editor, Division of Statistics and Information.

CONSTITUTIONAL PROVISION

ARTICLE I, CONSTITUTION OF NEW YORK

§ [1]18. Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer.

[1] Formerly § 19. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

This section, adopted November 4, 1913, and effective January 1, 1914, overrides section eighteen [now § 16] of article one of the constitution relative to the right of action to recover damages for injuries resulting in death: Shanahan v. Monarch Engineering Co., 219 N. Y. 469; 81 S. B. 321; Repka v. Fedders Mfg. Co., 239 App. Div. 271; 264 N. Y. Rep. 538; 188 S. B. 107. Insofar as the Legislature has not applied section nineteen [now § 18, supra] to accidental injuries, an employee still has right of action against his employer for negligence: Barrencotto v Cocker Saw Co., 266 N. Y. 139; 188 S. B. 110.

Justices of the Supreme Court have commented upon its concluding proviso in Bailey v. School District No. 5, 204 App. Div. 125; 118 S. B. 23; Krug v. City of New York, 196 App. Div. 226; 118 S. B. 22; and Brooklyn Children's Aid Society v. Industrial Board, 136 Misc. 379; 177 S. B. 277.

THE WORKMEN'S COMPENSATION LAW

CHAPTER 816 OF THE LAWS OF 1913, AS AMENDED AND RE-ENACTED BY CHAPTER 41 OF THE LAWS OF 1914, CONSTITUTING CHAPTER 67 OF THE CONSOLIDATED LAWS, AS AMENDED.

Article 1. Short title; definitions; application (§ § 1-3).
2. Compensation (§ § 10-34).
3. Occupational diseases (§ § 37-48).
4. Security for compensation (§ § 50-56*).
4-A. Silicosis and other dust diseases (§§ 65-72).
6. State insurance fund (§ § 76-99).
6-A. Workmen's compensation security funds (§ § 106-109-j).
7. Miscellaneous provisions (§ § 110-130).
8. Laws repealed; when to take effect (§ § 140, 141).

ARTICLE I

Short Title; Definitions; Application

Section 1. Short title.
2. Definitions.
3. Application.

Section 1. **Short Title.** This chapter shall be known as the "workmen's compensation law."

§ 2.† **Definitions.** As used in this chapter, 1. "Hazardous employment" means a work or occupatoon described in section [1] three of this chapter. [*Subd.* 1 *am'd by L.* 1922, *ch.* 615.]

[1] Word "three" substituted for word "two" by L. 1922, ch. 615.

[1]2. "**Department**" means the department of labor of the state of New York;

"**Commissioner**" means the industrial commissioner of the state of New York;

"**Board**" means the industrial board of the state of New York.

[1] Definitions of these three terms substituted by L. 1922, ch. 615, for definition of term "commission."

[1]"**Commissioners**" means the commissioners of the state insurance fund of the department of labor of the state of New York.

[*Subd.* 2 *am'd by L.* 1916, *ch.* 622; *L.* 1921, *ch.* 60; *L.* 1922, *ch.* 615; *and L.* 1938, *ch.* 585.]

[1] This paragraph added by L. 1938, ch. 585.

Compare division of powers and duties relative to workmen's compensation between the commissioner and the board by § 21, subd. 2, and § § 22, 27, of the Labor Law.

---

* So in original; should be 57.

† Former § 3, renumbered § 2 and amended by L. 1922, ch. 615.

3. "**Employer,**" except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments including the state and a municipal corporation or other political subdivision thereof. [*Subd.* 3 *am'd by L.* 1914, *ch.* 316.]

Compare § 56, below.

AGENCY FOR EMPLOYING

Responsibility for compensation may hinge upon the question whether or not an employing intermediary between the injured employee and an owner, proprietor or general contractor is a mere agent of such owner, proprietor or general contractor or is himself an independent contractor or subcontractor. Such intermediary, if a mere agent, is not liable for compensation; but if an independent contractor or a subcontractor, is liable. Mere agency places liability upon the owner, proprietor or general contractor. The evidence of agency must be clear and explicit: Kachel v. Serviss, 180 App. Div. 54; 95 S. B. 199; Benjamin v. Rosenberg Bros., 13 S. D. R. 525, 2 Bul. 126, 147; 180 App. Div. 234; 233 N. Y. Rep. 569; 95 S. B. 203; Dirisio v. Caterino & Kajdasz, 264 N. Y. Rep. 619; 185 S. B. 251; Tsangournos v. Smith, 14 S. D. R. 687, 3 Bul. 80; 183 App. Div. 751; 95 S. B. 207; Brown v. St. Vincent's Hospital, 222 App. Div. 402; 156 S. B. 233.

Hotel having contracted with social director for summer entertainment was held liable for compensation to dancer hired by latter: Fishbane v. Congress Operating Corp., 255 App. Div. 738; 280 N. Y. Rep. 611; 204 S. B. 1.

The question of agency has figured in the timber industry especially: Claremont v. DeCoss, 7 S. D. R. 463; 175 App. Div. 952; 220 N. Y. Rep. 671; 95 S. B. 195; Peake v. Lakin, 9 S. D. R. 290; 176 App. Div. 917; 221 N. Y. 496; 95 S. B. 195; Sullivan v. Preston, 10 S. D. R. 566; 177 App. Div. 110; 95 S. B. 198; Skeels v. Smith's Hotel Co., 195 App. Div. 39; 202 App. Div. 704; 114 S. B. 107.

The courts affirmed awards against corporation employers for injuries to a nephew helping his uncle to do piece work at the corporation's plant: Westfelt v. Atlas Furniture Co., 231 App. Div. 775; 256 N. Y. Rep. 578; 185 S. B. 250; to a niece helping her janitor uncle by running the elevator of an apartment house: Russell v. 231 Lexington Ave. Corp., 266 N. Y. 391; 185 S. B. 251, 252; and to a roofer taken by his foreman to perform a roofing job for a friend of the foreman: Griffin v. Becker Roofing Co. 224 App. Div. 684; 249 N. Y. Rep. 523; 161 S. B. 187; but reversed award against an uninsured theater owner for injury to a stage mechanic while doing carpentry work at the home of the theater's manager: Twitchell v. Wagner Productions, 228 App. Div. 870; 255 N. Y. Rep. 612; 177 S. B. 93.

The Court of Appeals held that a corporation managing a building was a third party in relation to a cleaner of the building's windows who fell and lost his life, the corporation owning the building being the cleaner's employer: Kindga v. Noyes Co., 260 N. Y. Rep. 521; a corporation owning a building settled out of court a suit against it as third party for death of the building's elevator operator by accident: Russell v. 231 Lexington Ave. Corp., 266 N. Y. 391; 185 S. B. 365; compare Buncamper v. Loft, 225 App. Div. 836; 177 S. B. 49, and Griffin v. Cruikshank & Co., 253 N. Y. 303; 177 S. B. 50.

For employer status of a bank seizing and running its debtor's business, see Van Schaick v. Sullivan and Manufacturers Trust Co., 241 App. Div. 268; 266 N. Y. Rep. 591; 185 S. B. 265.

The Appellate Division held a labor union responsible for compensation: Hines v. Stetler, 196 App. Div. 622; 123 S. B. 55.

The Attorney-General held that a group of workers dividing or exchanging products and soliciting employment under a barter and token plan was not the employer of its members: Opinion, March 21, 1933; and that the operators of

the Standard Oil Company's filling stations were employees of it but employers of their subordinates: Opinion, April 17, 1933, but compare Opinion of February 18, 1937, as to liability of Socony-Vacuum Oil Co. for compensation covering lessee-tenants of filling stations and their employees.

References to other court decisions and opinion upon the subject are in 162 S. B. 151, 152 and 204 S. B. 1.

ASSIGNEE OF JOB CONTRACT

Upon appeal from an award made to an injured employee against the employer-corporation, the latter contended that the award should have been made against its president as an individual since the job contract had been assigned to him. Award was affirmed with statement that the employee was not bound by an assignment of the contract from the corporation to the president where he had no knowledge of such assignment. Noel v. Morrison & Co., Inc., 260 App. Div. 377.

CONTRACT BETWEEN EMPLOYERS RELATIVE TO LABOR

Employers carrying on a single industrial project or closely related enterprises may enter into such a contract relative to labor as to cast doubt upon the responsibility of the one or other of them for compensation to their injured employees: Sharpe v. Queensboro Corp., 252 N. Y. Rep. 622; 185 S. B. 264; Gallagher v. N. Y. Central R. R. Co., 9 S. D. R. 335, 1 Bul. No. 11, p. 21; Meens v. Thompson-Starrett Co., 13 S. D. R. 553, 2 Bul. 153; Hudec v. Wilson & Co., 14 S. D. R. 555; 181 App. Div. 961; 95 S. B. 223; Buckley v. Western Union Telegraph Co., Case No. 15386; 202 App. Div. 766; 114 S. B. 110; Rahm v. Rochester L. & B. R. R. Co., 217 App. Div. 711; 149 S. B. 198, 223; Young v. Greeley Square Hotel Co., 225 App. Div. 837; 8 Ind. Bul. 521. The courts affirmed an award against a contractor and a subcontractor jointly: Dunbar v. McKenzie & Knapp, 198 App. Div. 946; 232 N. Y. Rep. 556; 114 S. B. 110.

See also cases cited under titles "General versus special employer," and "Multiple employers," below.

CORPORATION OR PARTNERSHIP COMPLICATIONS

An indvidual employer who takes a partner or incorporates his business should look to it that his workmen's compensation policy is changed, with knowledge and consent of the carrier, to the name of the partnership or company, instead of his own name, and in other respects adjusted to the new situation. Also a partner who gets rid of one partner and takes on another should look to it that his workmen's compensation policy is changed to the new partnership name. Otherwise, upon occurrence of an accident to an employee, the partnership or corporation may find itself without insurance. Instances in point are: Ardolino v. Ierna & Russo, 225 App. Div. 439; 161 S. B. 197; Beauchamp v. Altmark, 207 App. Div. 876; 29 S. D. R. 475; 123 S. B. 61; Gray v. Walker, 209 App. Div. 840; 123 S. B. 58; Richlin v. Kantrowitz and Kellem, 33 S. D. R. 392; Thompson v. Rambo, 34 S. D. R. 576. An employer doing business as an individual may make the error of procuring a policy covering himself and his son or other person as a partnership: Amish v. Amish, 209 App. Div. 505; 133 S. B. 202; Bernard v. Bernard, 32 S. D. R. 387.

The mere dropping out of an insured partner does not vitiate a policy: Goldstein v. Goldstein, 243 App. Div. 657; 14 Ind. Bul. 27; Angelo v. Triangle Broom & Brush Co., 243 App. Div. 657; 14 Ind. Bul. 82. The name of the insured in the policy is not important if the intent to cover the risk is clear: Lipschitz v. Hotel Charles, 226 App. Div. 840; affd., 252 N. Y. Rep. 518; 185 S. B. 296, 297; Volpe v. Westchester Concrete Co., 256 N. Y. Rep. 570; 185 S. B. 298; Curtis v. Lawrence Garage, 262 N. Y. Rep. 541; 185 S. B. 299; Doualiby v. Syrian American Baking Co. 232 App. Div. 860; 10 Ind. Bul. 196.

Question, should husband and wife jointly take out a policy insuring domestic servants, is suggested by Sweeny v. Wait, 261 N. Y. Rep. 690; 262 N. Y. Rep. 566; 188 S. B. 113.

Cases in which the injured claimant is a partner, not an employee, are noticed under subd. 6 of § 54 below. For prosecutions of false partnerships, see People v. Kaplan and People v. Levine, 160 Misc. 179, 181; 204 S. B. 38, 32, and People v. Simons, 274 N. Y. Rep. 554; 16 Ind. Bul. 217, 247. See also 204 S. B. 32-39.

EMPLOYER A MINOR, LIABILITY

The Appellate Division held an employer under twenty-one years of age liable for compensation: Rahman v. Bethel, 236 App. Div. 182; 185 S. B. 339.

GENERAL VERSUS SPECIAL EMPLOYER

The question of general versus special employer arises when one employer hires or lends his employee to another and said employee is injured under such working relationship. For court decisions and opinions on the subject, see Dale v. Saunders Bros., 171 App. Div. 528; 218 N. Y. 59; 81 S. B. 346; Dale v. Hual Construction Co., 9 S. D. R. 282; 175 App. Div. 284; 95 S. B. 210; DeNoyer v. Cavanaugh, 10 S. D. R. 599; 177 App. Div. 939; 221 N. Y. 273; 95 S. B. 211; Lee v. Cranford Co., 182 App. Div. 191; 230 N. Y. Rep. 618; 95 S. B. 213; Murray v. Union Ry. Co., 183 App. Div. 924; 229 N. Y. 110; 114 S. B. 107; Schweitzer v. Thompson & Norris Co., 229 N. Y. 97; 98 S. B. 60; Mackey v. City of New York, 193 App. Div. 535; 114 S. B. 108; Kittle v. Town of Kinderhook, 214 App. Div. 345; 140 S. B. 197; 244 N. Y. Rep. 612; 156 S. B. 209; Pfeiffer v. Armour & Co., 246 N. Y. Rep. 545; 149 S. B. 219, 220; 156 S. B. 237; La Rose v. Donnelly, 219 App. Div. 181; 156 S. B. 235; Van Buren v. Loucks & Sons, 258 N. Y. Rep. 621; 177 S. B. 28, 29; Rankin v. Vaudeville Acts Corp., 235 App Div. 883; 11 Ind. Bul. 273; Straus v. Goldstein & Bros., 264 N. Y. Rep. 498; 185 S. B. 255, 256; De Rosa v. Expert Concrete Breakers and D. E. H. Demolition Co., 261 App. Div. 857; Schieve v. Border Bldg. Co., and ano., 260 App. Div. 970. The Schweitzer case, above, distinguishes general employers from independent contractors. Compare note on "Independent contractors" under next subdivision.

One railroad was held not to be general employer towards another in Doran v. N. Y. City Interborough Ry. Co., 239 N. Y. 448; 140 S. B. 196.

The court of appeals affirmed award against a taxi company for accident to one of its chauffeurs while commandeered by a policeman: Babington v. Yellow Taxi Corp., 250 N. Y. 14; 161 S. B. 41.

The Appellate Division affirmed award against a golf club for injury to a caddy paid solely by players' tips: Meyer v. North Hills Golf Club, 238 App. Div. 752: 12 Ind. Bul. 51; 185 S. B. 227.

City having contracted with owner of team of horses to collect ashes at fixed daily sum was held liable for compensation to latter's employee injured while substituting for him: Meyers v. City of Rochester, 253 App. Div. 852; 204 S. B. 4.

Demonstrator for cosmetic company who was assigned to a department store where she worked under the latter's supervision selling its products as well as her own incurred injury in course of her employment there. Both companies had agreed that the demonstrator should be deemed the employee of the cosmetic company. Industrial Board's decision that the store was liable for fifty per cent of the award was reversed on ground that claimant was not its employee. Knox v. Gimbel Bros. and Guerlain, Inc., 258 App. Div. 1013; 204 S. B. 3.

Hospital having transferred its student nurse to another institution for special training was held jointly liable with latter institution for her death due to scarlet fever contracted there: Proctor v. Willard Parker Hospital and Genesee Hospital, ex rel., 256 App. Div. 1018; 204 S. B. 3.

Two sisters, owners of a building, were held liable for compensation to their janitor injured while working in an antique shop conducted by one of them: Church v. Mittelstaedt, 255 App. Div. 904; 280 N. Y. Rep. 613; 204 S. B. 2.

A carrier has been held liable for injury to a business employee detailed to a job at a private residence: Jaabeck v. Crane's Sons Co., 238 N. Y. 314; 133 S. B. 196. For additional cases, see annotations under § 54, Subd. 4, below.

References to other court decisions and opinions upon the subject are in 162 S. B. 153-155 and 204 S. B. 2-6.

GOVERNMENT CONTROL

A claim for workmen's compensation under a state compensation law cannot now be pursued by a railroad employee either against the United States or the

railroad for an accident occurring during the Federal administration of the railroads in the time of the World War: Snow v. U. S. R. R. Administration, 30 S. D. R. 376; 209 App. Div. 308; 239 N. Y. Rep. 528; 133 S. B. 194; O'Neil v. Erie R. R. Co., 218 App. Div. 247; 149 S. B. 220-223. The United States Supreme Court denied a writ of certiorari in the Snow case, Dec. 15, 1924. The leading case on liability under Federal control is Dahn v. Davis, 258 U. S. 421.

MORTGAGEE IN POSSESSION

Bank having taken possession of building for purpose of collecting rents and crediting them on its first mortgage was held liable for subsequent injury to janitor of said building: Wenks v. Dry Dock Savings Institution, 253 App. Div. 851; 204 S. B. 6.

MULTIPLE EMPLOYERS

In a unique ruling the Commission distributed responsibility for payment of an award among fifteen different employing firms: Sayers v. Ogdensburg Power & Light Co., 8 S. D. R. 393; 95 S. B. 236. It divided responsibility between two employers in another ruling but the court reversed the award as to one of them and the Board thereafter imposed the entire award upon the other: Job v. Hislop and Marshall Estate, 21 S. D. R. 182, 5 Bul. 25; 192 App. Div. 937; 98 S. B. 65; 114 S. B. 112.

The courts affirmed awards to commission salesmen against two employers in Bettinger v. Federal Concrete Co. and Hart & Son, 268 N. Y. Rep. 655; 188 S. B. 26; and Jacobi v. Supreme Junior Coat Co. and Samuelson & Co., 268 N. Y. Rep. 654; 188 S. B. 75; but affirmed award to a night watchman against a single owner out of seventeen owners whose premises he was guarding; Moochler v. Herrick & Son, 272 N. Y. Rep. 545; 204 S. B. 265; and to a dietitian against a church where she served special dinners during the year in addition to regular school work: McDowell v. Flatbush Congregational Church, 252 App. Div. 799; 277 N. Y. Rep. 536; 204 S. B. 262. See also Spiridigliozzi v. Nicola & Balzano, 238 App. Div. 751; 188 S. B. 30; Vogel v. Clifford, 245 App. Div. 874; 204 S. B. 266.

The Court of Appeals modified an award equally divided against two employers to have each pay the proportion that each paid the employee in wages, the employee acting as a watchman for the owner of a building and a janitor for one of the tenants: Stevens v. Hull, Grummond & Co., and Whipple, Inc., 274 N. Y. 227; 204 S. B. 263.

A New York employer, one of several located in different states, whose product decedent sold was held liable for compensation even though widow effected settlement with other employers under Texas law: Friedrich v. Hirsch & Sons, 257 App. Div. 878; 204 S. B. 406.

For references to additional cases involving identification of the employer, see 162 S. B. 151-156. Also, see topic, "Two or More Employers as Wage Source," 185 S. B. 229-232; 204 S. B. 262.

4. "**Employee**" means a person engaged in one of the occupations enumerated in section [1]three or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants [2]except where the employer has elected to bring such employees under the law by securing compensation in accordance with the terms of section fifty of this chapter [3]but may include [4]town super-

intendents of highways and volunteer firemen. [*Subd.* 4 *am'd by L.* 1916, *ch.* 622; *L.* 1922, *ch.* 615; *L.* 1935, *ch.* 384; *L.* 1939, *ch.* 271; *L.* 1941, *ch.* 639.]

[1] Word "three" substituted for word "two" by L. 1922, ch. 615.
[2] Words "except . . . this chapter" inserted by L. 1941, ch. 639.
[3] Words "but may include volunteer firemen" added by L. 1935, ch. 384.
[4] Words "town superintendents of highways and," inserted by L. 1939, ch. 271.

Subd. 4 was amended by two separate chapters in 1941, chs. 639 and 875. Subd. 4, as amended by L. 1941, ch. 639, is set out above. Subd. 4, as amended by L. 1941, ch. 875, is set out below.

For effect of amendments of this subdivision by L. 1916, ch. 622, indicated by numbered notes in the 1921 edition, compare opinions of Court of Appeals in Griffin v. Cruikshank Co., 253 N. Y. 303; 9 Ind. Bul. 169; Glatzl v. Stumpp, 220 N. Y. 71; 87 S. B. 169; Mulford v. Pettit & Sons, 220 N. Y. 540; 87 S. B. 172; and Dose v. Moehle Lithographic Co., 221 N. Y. 401; 87 S. B. 107; also opinion of Appellate Division in Spang v. Broadway B. & M. Co., 181 App Div. 443; 87 S. B. 111, and decision in Parmas v. Hotel Plaza Operating Co., Case No. 3581; 184 App. Div. 921; 97 S. B. 71.

4. "**Employee**" means a person engaged in one of the occupations enumerated in section [1]three or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants [2]but may include [3]volunteer firemen. [*Subd.* 4 *am'd by L.* 1916, *ch.* 622; *L.* 1922, *ch.* 615; *L.* 1935, *ch.* 384; *L.* 1939, *ch.* 271; *L.* 1941, *ch.* 875.]

[1] Word "three" substituted for word "two" by L. 1922, ch. 615.
[2] Words "but may include volunteer firemen" added by L. 1935, ch. 384.
[3] Words "town superintendents of highways and," inserted by L. 1939, ch. 271, stricken out by L. 1941, ch. 875.

APPLICANTS FOR EMPLOYMENT

Injury to an applicant for employment while enjoying privileges of his prospective employer's premises is not compensable: Brassard v. D. & H. Co., 186 App. Div. 647; 97 S. B. 50, or while undergoing test of his ability to operate a machine: Lederson v. Cassidy & Dorfman, 195 App. Div. 913; 197 App. Div. 912; 204 App. Div. 850; 106 S. B. 50.

Drowning of an applicant for employment while enroute to a job site aboard a steamship which sank was held compensable where decedent, although temporarily laid off, had retained his boat pass and payroll number and at time of the accident was applying for work in compliance with the foreman's advice: Buchignani v. Taylor Co., 256 App. Div. 1016; 281 N. Y. Rep. 707; 204 S. B. 8.

Compare title, "Training for work, persons undergoing," below.

CAMPER

Regular Y. M. C. A. camper was held over as camp leader for group of "Community Chest" boys. By arrangement with the Y.M.C.A. the Chest had taken over the camp's facilities for a short period. Said leader sustained injury while boxing during the camp's supervised recreation period. Award against Y.M.C.A. was affirmed. Swartout v. Niagara Falls Y.M.C.A., 258 App. Div. 828; 204 S. B. 8. But see Rubinstein v. Madison House Society, 239 App. Div. 867; 188 S. B. 65.

CHILD HELPING MOTHER

Ten year old child who helped mother pick beans in field for cannery and who incurred injury while being transported in the employer's truck to another field was held to be an employee. Double compensation for violation of § 130 of the Labor Law was affirmed. Moreno v. Halstead Canning Co., 258 App. Div. 832; 204 S. B. 9. See also Craciola v. Lewis & Holbert, 233 App. Div. 437; 177 S. B. 22.

COMMISSION SALESMEN

Salesmen paid solely by commission are employees: Bettinger v. Federal Concrete Co. and Hart & Son, 268 N. Y. Rep. 655; 188 S. B. 26; Jacobl v. Supreme Junior Coat Co. and Samuelson & Co., 268 N. Y. Rep. 654; 185 S. B. 228; Gordon v. Doherty & Co., 242 App. Div. 884; 13 Ind. Bul. 310.

COPARTNERS OR CORPORATION OFFICERS ACTING AS EMPLOYEES

See subd. 6 of § 54, below, and notes thereunder.

DOMESTIC SERVANTS

An employer may elect to bring domestic servants under the compensation law in accordance with § 3, subd. 1, group 19, below, which see.

In Dimisa v. Detmer Nurseries, 231 App. Div. 771; 177 S. B. 27, 28, question was whether employee was a domestic servant or a nursery employee. Adams v. Ross, 230 App. Div. 216; 177 S. B. 26, has domestic service aspect. A chauffeur repairing his employer's family touring car has domestic servant status, though he also operates his employer's business truck: Wincheski v. Morris, 179 App. Div. 600; 87 S. B. 195. Compare Kender v. Reineking, 19 S. D. R. 485, 4 Bul. 143; 228 N. Y. 240; 106 S. B. 83; and Fuentis v. Davis Electrical Constr. M. & S. Co., 225 App. Div. 839; 8 Ind. Bul. 519.

For the status of domestic servants in the employ of an agency which supplied them to people but paid them directly, see Opinion of Attorney-General, Dec. 26, 1936.

EMPLOYERS ACTING AS EMPLOYEES

See subd. 6 of § 54, below, and notes thereunder.

FARM LABORERS

An employer may elect to bring farm laborers under the compensation law in accordance with § 3, subd. 1, group 19, below, which see.

For production of firewood and logs by farmers upon their own farms and marketing thereof, see "Lumbering" under group 13, below. The employee in Cummings v. Bruce & Drake, 231 App. Div. 775, 177 S. B. 29, 30, was both farm laborer and woodsman.

A laborer who was employed to draw logs to his farmer-employer's saw mill from the premises of a third party was injured in course of the work. The farmer-employer was also engaged in lumbering, trucking and general contracting. Industrial Board's finding that the injured employee was not a farm laborer was sustained. Miles v. Colegrove, 258 App. Div. 1014; 284 N. Y. Rep. 609; 204 S. B. 10.

A farmer contracted with his neighbor to haul firewood from the latter's woodlot to his dwelling at $2 per day for a team and $2 per day per man. A laborer in the employ of the farmer sustained injury while hauling the firewood. Claim for compensation was dismissed on ground that the injured employee was a farm laborer. Butterfield v. Brown, 261 App. Div. 1022.

A laborer worked on a dairy farm which pastcurized its own milk and extra milk purchased from other farmers. He did not work in the pasteurizing room. After pasteurization the milk was distributed to a retail trade. Said laborer was injured while feeding cows. Claim for compensation was dismissed on ground that the injured employee was a farm laborer. Laduke v. Martin, 261 App. Div. 344.

The Appellate Division has defined farm labor in Adams v. Ross, 230 App. Div. 216, 177 S. B. 26, the case of an employee upon a city home estate, in Coleman v. Bartholomew, 175 App. Div. 122, 87 S. B. 193, the case of an employee injured while slating a farm barn roof, and in King v. Burlingame, 242 App. Div. 499, 185 S. B. 213, the case of a university student operating a buzz saw; it affirmed award to the widow of a mason killed in erecting a farm silo: Buccos v. Moran, 231 App. Div. 773; 177 S. B. 28.

A laborer employed to take care of poultry on farm operated by a corporation conducting retail stores was held to be a farm laborer: Bennett v. Stoneleigh Farms, Inc., 254 App. Div. 790; 204 S. B. 10.

The Court of Appeals reversed award to a farm laborer assigned to assist a contractor building a barn: Van Buren v. Loucks, 258 N. Y. Rep. 621; 177 S. B. 28, 29. The department denied compensation to a painter injured while painting a farm building: McComsey v. Simmons, 7 S. D. R. 433.

A laborer employed in the operation of a commercial grist mill on a dairy farm was held not to be a farm laborer: Hamilla v. Gade, 252 App. Div. 712; 278 N. Y. Rep. 502; 204 S. B. 9. For cases involving the operation of threshing machines on farms, see White v. Loades, 178 App. Div. 236; 87 S. B. 80; Vincent v. Taylor Bros., 180 App. Div. 818; 185 App. Div. 901; 87 S. B. 80; and Van Valkenburgh v. N. Y. State Vocational School, 256 App. Div. 1008; 204 S. B. 24.

Accident to a canning factory employee gathering beans from lands of the factory is compensable: Clarke v. Sherman, 15 S. D. R. 602; 184 App. Div. 921; 97 S. B. 84; also accident to a teamster upon building work sent to a field to get a load of hay for his team: Bentley v. Sherman, Case No. 500629; 198 App. Div. 983; 118 S. B. 36.

Exclusion as a farm laborer has been held to apply to an employee logging on a farm: Brockett v. Mietz, 184 App. Div. 342; 97 S. B. 148; to an employee havesting ice for farm use: Mullen v. Little, 186 App. Div. 169; 97 S. B. 149; and to an employee hauling garbage for a farmer's pigs: Halletz v. Wiseman, 193 App. Div. 4; 106 S. B. 166; but compare Brockett's case with Uhl v. Hartwood Club, 221 N. Y. 588; 87 S. B. 186; and Clarke's case with Morse v. Willow Brook Dairy, 20 S. D. R. 392, 4 Bul. 169; 97 S. B. 147.

The Appellate Division affirmed the denial of award in the case of a milk route driver: Stickle v. Smith & Son, 26 S. D. R. 379; 202 App. Div. 773; 118 S. B. 37.

Farm labor, voluntarily covered, has been divided for purposes of determining wage rate into two classes, general farm hands working the year round and special farm hands working only during the fruit or harvest season: Deverso v. Parsons, 221 App. Div. 622; 156 S. B. 210.

Other farm labor cases are: Cross v. Whittley, 261 N. Y. Rep. 546; 188 S. B. 93; O'Dell v. Bowman, 19 S. D. R. 523, 4 Bul. 166; 189 App. Div. 386; 97 S. B. 146; Muller v. City of New York, 20 S. D. R. 375; 189 App. Div. 363; 97 S. B. 77; Gisner v. Dunlop, 21 S. D. R. 352; 191 App. Div. 633; 106 S. B. 116; Lewkowitz v. Cohen, Case No. 510717; 202 App. Div. 769; 30 S. D. R. 441; 118 S. B. 36; Sullivan v. Glens Falls Portland Cement Co., 202 App. Div. 854; 234 N. Y. Rep. 552; 118 S. B. 39; Millard v. Townsend, 204 App. Div. 132; 118 S. B. 45; Karminski v. Handwerg, 236 App. Div. 869; 11 Ind. Bul. 443; McAllister v. Cobb, 237 App. Div. 674; 188 S. B. 23; Allen v. Todd, 239 App. Div. 867; 188 S. B. 24; O'Connell v. Convent of Jesus and Mary, 241 App. Div. 639; 13 Ind. Bul. 30; Otis v. House of Providence, 241 App. Div. 641; 13 Ind. Bul. 31; Sohl v. Durkee, 241 App. Div. 635; 13 Ind. Bul. 32; Wise v. Whalen, 241 App. Div. 900; 13 Ind. Bul. 150; Simpson v. Deutschbein, 242 App. Div. 719; 13 Ind. Bul. 204. Compare 87 S. B. 193-195; 97 S. B. 146-149; 106 S. B. 165-167; 118 S. B. 36, 37; 133 S. B. 37, 38; 140 S. B. 35; 149 S. B. 23; 177 S. B. 25-30, 52; 188 S. B. 23, 24, 63, 93; 204 S. B. 9-11.

FIREMEN

For status of municipal firemen relative to workmen's compensation coverage, see note under § 3, subd. 1, gr. 17. For elective coverage of volunteer firemen, see § 3, subd. 1, gr. 19, below.

INDEPENDENT CONTRACTORS

An independent contractor, not being an employee, does not come within the Workmen's Compensation Law's coverage. An independent contractor does the work of the person with whom he contracts without bossing or supervision by such person as to his methods of doing it. Such is his chief characteristic. He is commonly a skilled artisan. Additional distinguishing marks may be that he is not bound to regular hours of work, receives a lump sum agreed upon in advance rather than pay by the day or hour and is not subject to discharge.

Apartment house manager was held to be an employee: Morse v. Miltwess Realty Co., 257 App. Div. 882; 204 S. B. 11.

Bill poster for theatres was held to be an employee: Hamilton v. Landau Amusement Corp., 262 App. Div. 787.

Blaster was held to be an employee: Thye v. R. W. S. Corp., 253 App. Div. 853; 204 S. B. 12.

Bricklayer was held to be an employee: Notaro v. Holy Cross R. C. Church Society, 260 App. Div. 968.

Car unloader was held to be an employee: Huetten v. Niagara Box Co., 256 N. Y. Rep. 562; 177 S. B. 36.

Carpenter was held to be an employee: Dirisio v. Katerino & Kajdasz, 264 N. Y. Rep. 619; 185 S. B. 251; carpenters were held to be independent contractors: Boardway v. Kellas, 258 N. Y. Rep. 545; 177 S. B. 39; Burns v. Hughes, 258 App. Div. 1023; 204 S. B. 13.

Cleaning woman was held to be an employee: Keller v. Equitable Life Assurance Society, 246 App. Div. 565; 271 N. Y. Rep. 511; 188 S. B. 26.

Commission salesmen were held to be employees: Bettinger v. Federal Concrete Co., 268 N. Y. Rep. 655; 188 S. B. 26; Shannon v. Phillips, ex rel., 258 App. Div. 831; 283 N. Y. Rep. 673; 204 S. B. 19.

Dairy route delivery man was held to be an employee: Glielml v. Netherland Dairy Co., 254 N. Y. 60; 177 S. B. 33.

Dietitian was held to be an employee: McDowell v. Flatbush Congregational Church, 252 App. Div. 799; 277 N. Y. Rep. 536; 204 S. B. 262.

Embalmers were held to be employees: Link v. Kennedy, 256 N. Y. Rep. 565; 177 S. B. 36; Henault v. Endres Co., 251 App. Div. 758; 204 S. B. 14.

Engineer installing machinery was held to be an employee: McNally v. Diamond Mills Paper Co., 223 N. Y. 83; 87 S. B. 103.

Gas and oil station salesman was held to be an independent contractor: Dunn v. University of Rochester, 266 N. Y. 362; 185 S. B. 226; 188 S. B. 31.

Glove cutter was held to be an independent contractor: Archer v. Cole, 244 App. Div. 848; 188 S. B. 28.

Golf caddy was held to be an employee: Meyer v. North Hills Golf Club, 238 App. Div. 752; 12 Ind. Bul. 51; but see Le Page v. Lee Wood Golf Club, 245 App. Div. 888, which was reversed on other grounds.

Homeworkers making clothing, artificial flowers, etc., and paid by the piece, were held to be employees: Liberatore v. Freeman, 224 N. Y. Rep. 710; 97 S. B. 62; Gerber v. Unterberg & Co., 234 App. Div. 643; 11 Ind. Bul. 29; Friedman v. Apt Novelty Co., 231 App. Div. 774; 177 S. B. 36; Hiltunen v. Orser, 225 App. Div. 838; 177 S. B. 36; Allied Mutuals Liability Insurance Co. v. De Jong, 209 App. Div. 505; 133 S. B. 48; Fiocca v. Dillon, 7 S. D. R. 399; 175 App. Div. 957; 95 S. B. 143; but see Opinion of Attorney-General, June 9, 1932, in Report of Industrial Commissioner, 1932, pp. 91, 92.

Hospital interne was held to be an employee: Bernstein v. Beth Israel Hospital, 236 N. Y. 268, 133 S. B. 42.

Jockeys were held to be employees: Pierce v. Bowen, 247 N. Y. 305; 156 S. B. 28; Rice v. Stoneham, 254 N. Y. Rep. 531; 177 S. B. 37.

Linoleum layer was held to be an independent contractor: Lichtenager v. Silverman, 260 N. Y. Rep. 667; 177 S. B. 40; 188 S. B. 29.

Lumberman was held to be an independent contractor: Towers v. Putnam, 234 App. Div. 641; 11 Ind. Bul. 31.

Mason was held to be an independent contractor: Keefer v. Boyd & Whipple, 257 App. Div. 879; 204 S. B. 15.

New York City school building custodian was held to be an independent contractor: Bederman v. McNamara, 268 N. Y. Rep. 510; 185 S. B. 253.

Newsboys were held to be employees: Bergeron v. Press Co., ex rel., 252 App. Div. 716; 204 S. B. 15; Fagan v. Albany Evening Union Co., 261 App. Div. 861.

Nurse was held to be an independent contractor: Renouf v. N. Y. Central R.R. Co., 254 N. Y. 349; 177 S. B. 43.

Painters were held to be employees: Knudstad v. Emigrant Industrial Savings Bank, 252 App. Div. 823; 278 N. Y. Rep. 610; 204 S. B. 16; Dorsey v. Montgomery, 257 App. Div. 1095; 204 S. B. 17; Stoddard v. School District No. 11. Town of Coeymans, 258 App. Div. 1015; 204 S. B. 16. Painters were held to be independent contractors: Litts v. Risley Lumber Co., 224 N. Y. 321; 97 S. B. 60; Smith v. Manmark Realty Corp., 241 App. Div. 778; 188 S. B. 29; Empie v. Cossart, 259 App. Div. 941; 204 S. B. 17; Carpenter v. Kane, 252 App. Div. 707; 285 N. Y. Rep. —.

Portrait solicitor was held to be an employee: Quigley v. Chicago Portrait Co., 234 App. Div. 640; 11 Ind. Bul. 30.

Roofer was held to be an independent contractor: Beach v. Velzy, 238 N. Y. 100; 133 S. B. 44.

Salesmen (see Commission salesmen, above).

Sawyer was held to be an independent contractor: Manning v. Whalen, 259 App. Div. 490; 204 S. B. 20.

Schochtim were held to be employees: Opinion of Attorney-General, April 6, 1937.

Shingler was held to be an employee: Saile v. Cashier Co., 253 App. Div. 848; 204 S. B. 22; but see Gotti v. Anthony, 257 App. Div. 880; 204 S. B. 23.

Silo erector was held to be an employee: Campbell v. Craine, Inc., 240 App. Div. 741; 263 N. Y. Rep. 579; 188 S. B. 28.

Steamfitter was held to be an independent contractor: McCarthy v. 2009 La Fountaine Ave., 259 App. Div. 947; 204 S. B. 23.

Taxicab driver was held to be an employee: Maher v. Commander Taxi Corp., 227 App. Div. 832; 177 S. B. 37.

Threshing machine owner-operator was held to be an independent contractor: Van Valkenburgh v. N. Y. State Vocational School, 256 App. Div. 1008; 204 S. B. 24.

Tinsmith was held to be an employee: Greenspan v. Bleichfeld, 262 N. Y. Rep. 674; 188 S. B. 27.

Town shovel repairer was held to be an independent contractor: Osterhout v. Town of Rochester, 246 App. Div. 873; 188 S. B. 30.

Truck repairer was held to be an independent contractor: Roberts v. South Side Coal Co., 236 App. Div. 768; 188 S. B. 29.

Truckmen were held to be employees: Washburn v. Bunce, 248 App. Div. 652; 272 N. Y. Rep. 547; 204 S. B. 25; Prisco v. Guilano, 252 App. Div. 713; 277 N. Y. Rep. 659; 204 S. B. 24; Friona v. Wendling, 230 App. Div. 139; 188 S. B. 27; Green v. Alert Contracting Co., Inc., 256 App. Div. 864; 204 S. B. 26; Carriere v. Syracuse Freight & Forwarding Co., 259 App. Div. 764; 204 S. B. 26. Truckmen were held to be independent contractors: Kavanaugh v. Belden, 231 App. Div. 412; 177 S. B. 46; Diester v. Wolpert Realty Co., 256 N. Y. Rep. 650; 177 S. B. 45; Mulderry v. Coyle Wrecking Corp., 257 App. Div. 879; 281 N. Y. Rep. 859; 204 S. B. 27.

Trunk handler was held to be an employee: Mosley v. Rosenstein Estate, 264 N. Y. Rep. 497; 188 S. B. 25.

Veterinarian was held to be an independent contractor: LeFevre v. Village of Newark, 235 App. Div. 645; 11 Ind. Bul. 161.

Watchman for several places was held to be an employee: Phillips v. Dunkirk Printing Co., 257 App. Div. 1090; 204 S. B. 27; but see Spiridigliozzi v. Nicola & Balzano, 238 App. Div. 751; 188 S. B. 30.

Window cleaner was held to be an employee: Bederman v. McNamara, 243 App. Div. 661; 268 N. Y. Rep. 510; 188 S. B. 26; but see Crisp v. Glenn, 227 App. Div. 678; 177 S. B. 46.

Woodsmen paid by the tract or cord are employees and not independent contractors; accidents to them are compensable: Claremont v. De Coss, 7 S. D. R.

463; 175 App. Div. 952; 220 N. Y. Rep. 671; 95 S. B. 195; Sullivan v. Preston, 10 S. D. R. 566; 177 App. Div. 110; 95 S. B. 198; Tsangournos v. Smith, 14 S. D. R. 687, 8 Bul. 80; 183 App. Div. 751; 95 S. B. 207; Fancher v. Boston Excelsior Co., 203 App. Div. 294; 235 N. Y. 272; 118 S. B. 41.

For other independent contractor cases see 162 S. B. 14-17; 177 S. B. 31-46, 136; 188 S. B. 24-30, 68, 93, 112; 204 S. B. 11-29.

Unsuccessful attempts to evade the status of employee by written contracts figured in Glielmi v. Netherland Dairy Co., 254 N. Y. 60; 177 S. B. 33; Maher v. Commander Taxi Corp., 227 App. Div. 832; 177 S. B. 37; Blum v. Levy & Sons, 228 App. Div. 867; 177 S. B. 35; Gold v. Wooters, 233 App. Div. 883; 11 Ind. Bul. 326; Straus v. Goldstein & Bros., 264 N. Y. Rep. 498; 185 S. B. 256; Brandt v. Jackling, 251 App. Div. 763; 204 S. B. 36; People v. Levine, 160 Misc. 181; 204 S. B. 32; People v. Simons, 249 App. Div. 809; 274 N. Y. Rep. 574; 16 Ind. Bul. 217, 247; People v. Cartus, 253 App. Div. 705; 16 Ind. Bul. 526; Opinions of Attorney-General, August 27 and November 8, 1934, April 27, 1937, and May 20, 1937.

INMATES OF INSTITUTIONS

The Court of Appeals, with opinions, affirmed award against the Salvation Army in the case of an inmate of one of its homes hurt while serving it as an employee: Hall v. Salvation Army, 236 App. Div. 199, 261 N. Y. 110, 177 S. B. 47, 188 S. B. 32; but reversed award against an Odd Fellows Home for death of an inmate while working for it: Seymour v. Odd Fellows Home, 267 N. Y. 354, 188 S. B. 33. The Appellate Division affirmed award to an inmate of a sailors' home: Nilsen v. Trustees of Sailors Snug Harbor, 230 App. Div. 797, 177 S. B. 48. Subsequent to these decisions, Chapter 217 of the Laws of 1936 has excluded such inmates from coverage if not under express contract of hire. Inmates of county jails performing work do not have an employee status: Opinion of Attorney-General, March 24, 1936. Numerous chapters of the session laws have conferred jurisdiction upon the Court of Claims to hear and determine compensation claims for work accidents to inmates of state prisons, hospitals and reformatories; for the court's opinion and decision in one such case, see Scala v. State of New York, 147 Misc. 622.

LABOR LAW DEFINITION OF EMPLOYEE

The Attorney-General argued that this definition must be read and construed in connection with the Labor Law's definition of "employee": Brew v. Evey Holding Corp., 238 App. Div. 885; 12 Ind. Bul. 80; Seymour v. Odd Fellows Home, 267 N. Y. 354; 188 S. B. 33.

NATIONAL GUARDSMAN

Soldier in the State militia killed while in active service was held not to be an employee of the State within meaning of the Workmen's Compensation Law: Goldstein v. State of New York, 257 App. Div. 897; 281 N. Y. 396; 204 S. B. 29.

NATIONAL YOUTH ADMINISTRATION "EMPLOYEES"

Students, etc., working for State or local bodies and paid from Federal funds through the National Youth Administration are employees of such State or local bodies and should be included in their compensation coverage: Opinion of Attorney-General, February 9, 1940.

PARTNERS ACTING AS EMPLOYEES

See subd. 6 of § 54, below, and notes thereunder.

PENSIONER CONTINUING TO WORK

Costello v. Levey Co., 247 App. Div. 828; 271 N. Y. Rep. 638; 188 S. B. 35.

PIECE WORKERS

See Independent contractors, above.

POLICEMEN

For status of municipal policemen relative to workmen's compensation coverage, see note under § 3, subd. 1, gr. 17, below.

PSEUDO PARTNERS

Alleged partnership formed by building contractor with workmen to do a particular alteration job was held to be an evasion of the Workmen's Compensation Law: People (Fein) v. Beatty, 171 Misc. 1004; 204 S. B. 36.

Carpenter who worked for builder and was required to join a partnership for the sole purpose of evading the Workmen's Compensation Law was held to be an employee of the builder: Sachkowsky v. Gombert, 256 App. Div. 1018; 204 S. B. 35.

Other cases involving alleged partnership agreements are reported in 204 S. B. 32-39.

SPOUSE AS EMPLOYER

A husband was awarded compensation as an employee of his wife: Salmeri v. Salmeri, Case No. 353110; 196 App. Div. 910; 106 S. B. 51; Sullivan v. Sullivan, 238 App. Div. 886; 12 Ind. Bul. 83; and a wife death benefits as employer of her husband: Shankin v. Shankin, 224 App. Div. 804; 161 S. B. 22. See also Morgan v. Morgan, 209 App. Div. 841; 133 S. B. 35.

For cases involving wife as employee of husband, see Lewkowitz v. Cohen, 202 App. Div. 769; 133 S. B. 54; Confiniotis v. Confiniotis & Nicas, 202 App. Div. 860; 118 S. B. 30; Spanick v. Glantz, 209 App. Div. 255; 133 S. B. 53, 54; Anderson v. Horling, 214 App. Div. 826; 140 S. B. 183; and Pallo v. Egan, 214 App. Div. 831; 140 S. B. 183.

STUDENT BEAUTICIANS

Beauty culture school which permitted its student beauticians to practice their art on the public, deriving pecuniary gain for the services so rendered, was required to include said students in its workmen's compensation policy: Miller (Industrial Commissioner) v. Garford Laboratories, Inc., 172 Misc. 567; 204 S. B. 40.

TOWN SUPERINTENDENTS OF HIGHWAYS

Award to an elective superintendent of highways against a self-insuring town, member of mutual insurance plan, was affirmed where latter consented to bring him within the law: Clemens v. Town of Osceola, 257 App. Div. 884; 204 S. B. 189.

An elective town superintendent of highways was held to be an executive officer of a municipal corporation and included in its workmen's compensation policy: Van Buren v. Town of Richmondville, 257 App. Div. 1089; 204 S. B. 513.

Carrier's contention that its policy did not cover the injured employee was not sustained where the policy expressly covered claimant by name as an employee and claimant was an elective town superintendent of highways: Dann v. Town of Veteran, 254 App. Div. 462; 278 N. Y. 461; 204 S. B. 533.

TRAINING FOR WORK, PERSONS UNDERGOING

The Court of Appeals affirmed award to a claimant hurt while under training to be a physician: Bernstein v. Beth Israel Hospital, 236 N. Y. 268; 133 S. B. 42; and the Appellate Division to claimant hurt while under training to be a traveling salesman: Depew v. Eureka Vacuum Cleaner Co., 226 App. Div. 835; 177 S. B. 49; and to be a nurse: Zypitz v. St. Francis Hospital, 231 App. Div. 768; 177 S. B. 49; Nelson v. Saint Francis Hospital, 249 App. Div. 910; 204 S. B. 173; to be a director of amateur theatrical shows: Adams v. Universal Producing Co., 250 App. Div. 805; 16 Ind. Bul. 127. Relative to workmen's compensation status of hospital volunteer workers and students, see Opinion of Attorney-General, March 20, 1933; of students in a preparatory school performing work in connection with their instruction for which they receive remuneration, Opinion of April 19, 1937; of student beauticians: Miller (Industrial Commissioner) v. Garford Laboratories, Inc., 172 Misc. 567; 204 S. B. 40.

VOLUNTEERS

Persons voluntarily performing friendly acts of temporary aid upon request and without wages do not thereby become employees: Farrington v. U. S. R. R. Administration, 20 S. D. R. 365; 190 App. Div. 920; 228 N. Y. Rep. 564; 97 S. B. 51; Weiss v. Employers' Liability Assurance Corp., 131 Misc. 302; 156 S. B. 36. Compare Ferro v. Sinsheimer Estate, 256 N. Y. 398; 177 S. B. 19, 20; Mandatto v. Hudson Shoring Co., 20 S. D. R. 446, 5 Bul. 28; 190 App. Div. 71; 229 N. Y. 624; 97 S. B. 53; Powers v. Persico, 236 App. Div. 750; 11 Ind. Bul. 336; Mosley v. Rosenstein Estate, 264 N. Y. Rep. 497; 188 S. B. 25. A donator of singing service is not an employee: Opinion of Attorney-General, November 17, 1933; nor lodge members donating services to repair lodge building: Id., March 30, 1936; nor volunteer cleaning up debris on church grounds: Id., November 16, 1936. Volunteer service, without hire, does not count under the "workmen or operatives" provision, Group 18 of subd. 1 of § 3, below.

WORKMEN OR OPERATIVES

For definition of "workmen or operatives", as such phrase is used in § 3, subd. 1, gr. 18, below, see notes thereunder, page 83.

5. "**Employment**" includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith, except where the employer [1]elects to [2]bring his employees within the provisions of this chapter as provided in section [3]three [4]and except where a municipal corporation or other political subdivision of the state [5]or an incorporated volunteer fire company which renders fire protection service on a contract basis elects to have the provisions of this chapter apply to volunteer firemen [6]and except where a town elects to have the provisions of this chapter apply to the town superintendent of highways. [*Subd. 5 am'd by L.* 1916, *ch.* 622; *L.* 1917, *ch.* 705; *L.* 1922, *ch.* 615; *L.* 1935, *ch.* 384; *L.* 1939, *ch.* 271; *L.* 1940, *ch.* 225; *L.* 1941, *ch.* 639.]

[1]Words "and his employees have by their joint election elected" stricken out and word "elects" inserted by L. 1941, ch. 639.

[2]Words "bring his employees within" substituted for words "become subject to" by L. 1941, ch. 639.

[3]Word "three" substituted for word "two" by L. 1922, ch. 615.

[4]Words "and except . . . volunteer firemen" added by L. 1935, ch. 384.

[5]Words "or an . . . contract basis" inserted by L. 1940, ch. 225.

[6]Remainder of subdivision added by L. 1939, ch. 271.

PECUNIARY GAIN

Provisions of § 3, grs. 15-19, § 55, and amendments to this subdivision have established four exceptions to the pecuniary gain limitations, (1) public employment, (2) employment covered by "joint election", (3) employment engaging four or more workmen or operatives regularly, (4) employment for which a carrier has accepted a premium.

If an organization not primarily created for business engages in a profit yielding enterprise, the profits will be pecuniary gain, or not, according to the disposition made of them: Uhl v. Hartwood Club, 9 S. D. R. 360, 2 Bul. 27; 177 App. Div. 41; 221 N. Y. Rep. 588; 87 S. B. 186; Dillon v. Trustees of St. Patrick's Cathedral, 197 App. Div. 201; 234 N. Y. 225; 118 S. B. 129; Rugg v. Norwich Hospital Assn., 205 App. Div. 174; 118 S. B. 130. Accidental injury to an employee in experimental work carried on with a view to ultimate profit is

compensable: Galelli v. Magnesite Products Co., 7 S. D. R. 416; 87 S. B. 186.

The responsibility of a residence owner, who occupies part of his house and lets out part of it for profit, for compensation to a person injured while repairing it will depend upon what part of the house is undergoing the repair and upon whether the injured person is an independent contractor or not. See Goldberger v. Goldberger, 30 S. D. R. 321; 209 App. Div. 840; 133 S. B. 99, 100; citations in 162 S. B. 67; review in 177 S. B. 135-137; Sawicki v. Jurkewisl, 233 App. Div. 785; 10 Ind. Bul. 269.

Painter agreed with owner of dwelling house to do some painting and repair work on the building for 65 cents an hour. The painter controlled his own time and furnished ladders, brushes and putty. The owner furnished the paint and aside from instructions as to what portions of the building were to be painted exercised no supervision over the work. The owner and his wife who lived in the dwelling boarded the local school teacher and accepted tourists as paying guests. Claim for compensation filed by the painter for injuries sustained in course of the work was dismissed on ground that he was an independent contractor and not an employee and that the owner was not engaged in a trade, business or occupation for pecuniary gain. Empie v. Cossart, 259 App. Div. 941; 204 S. B. 17.

Cases of business employees hurt while doing jobs at the private residences of their employers or their employers' offices are: Jaabeck v. Crane's Sons Co., 238 N. Y. 314; 133 S. B. 196; MacDonald v. Grand Battery & Ignition Service, 254 N. Y. Rep. 605; 185 S. B. 312; Twitchell v. Wagner Productions, 255 N. Y. Rep. 612; 177 S. B. 93; Collier v. Dangard, 256 N. Y. Rep. 561; 185 S. B. 314; and Reed v. Mapstone Bros., 205 App. Div. 767; 133 S. B. 50. For additional cases, see 204 S. B. 522.

Cases turning upon double use of automobiles for pleasure and business are: Wincheski v. Morris, 179 App. Div. 600; 87 S. B. 195; and Kender v. Reineking, 19 S. D. R. 485; 4 Bul. 143; 188 App. Div. 984; 228 N. Y. 240; 106 S. B. 83.

Estoppel under § 55 obviated pecuniary gain objection in Romer v. Delafield, 30 S. D. R. 414.

For full outline and citations relative to the pecuniary gain provision, see 162 S. B. 66, 67; see also 177 S. B. 133-137; 188 S. B. 93; 204 S. B. 42.

CASUAL EMPLOYMENT

Accidental injuries to workers casually employed to repair or improve buildings in which are conducted the occupations enumerated in § 3, subd. 1, or to install machinery, etc., therein are compensable: McNally v. Diamond Mills Paper Co., 223 N. Y. 83; 87 S. B. 103. Compare also the amendments of § 2, subds. 4 and 13, effected by L. 1916, ch. 622, and L. 1917, ch. 705. These amendments, together with the McNally decision and the decision in Dose v. Moehle Lithographic Co., 221 N. Y. 401; 87 S. B. 107, offset the decision in Bargey v. Massaro Macaroni Co., 218 N. Y. 410; 81 S. B. 139, which denied compensation to a carpenter casually employed to put a partition in a macaroni factory on the ground that the factory was not carrying on the carpentry business for pecuniary gain. Employing carpenters have been held to be independent contractors in Bache v. Salvation Army, 202 App. Div. 17; 123 S. B. 57, and Hadden v. Stanton, 9 S. D. R. 294; 177 App. Div. 938; 95 S. B. 194.

HAZARDOUS EMPLOYMENT FOR NON-HAZARDOUS BUSINESS

Accidents to carpenters, etc., regularly and permanently employed by department stores and other non-hazardous businesses are compensable: Mulford v. Pettit & Sons, 220 N. Y. 540; 87 S. B. 172; Alterman v. Namm & Co., 190 App. Div. 76; 299 N. Y. 640; 97 S. B. 141. Carpenters have been specifically added to the coverage list, § 3, subd. 1, gr. 12, by L. 1922, ch. 615.

6. "**Compensation**" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

PERSONS ENTITLED TO COMPENSATION

Undertakers are not "persons entitled to compensation" within the meaning of § 15, subds. 8 and 9: State Industrial Commission v. Newman, 179 App. Div. 481; 222 N. Y. 363; 95 S. B. 29.

MEDICAL EXPENSES

"Compensation" also includes medical expenses incurred by the injured employee: Semmen v. Butterick Publishing Co., 101 Misc. 285; 95 S. B. 24; Feldstein v. Buick Motor Co., 115 Misc. 170; 114 S. B. 11; Weinreb v. Harlem Bakery & Lunch Room, 204 App. Div. 293; 123 S. B. 28; Opinion of Attorney-General, April 24, 1936.

7. "**Injury**" and "**personal injury**" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.

ACCIDENT DEFINED

According to definition approved by the Appellate Division and the Court of Appeals, an accident is "an unlooked for mishap or an untoward event which is not expected or designed," being limited so that "an act done deliberately and wilfully by a third party may be an accident from the view-point of employer and employee:" Heitz v. Ruppert, 218 N. Y. 148; 81 S. B. 214-217; Yume v. Knickerbocker Portland Cement Co., 3 S. D. R. 353; 169 App. Div. 905; 216 N. Y. Rep. 653. For citations to these and other cases interpreting accident and the relations of assault to employment, see 162 S. B. 7-10, 42-45; see also 177 S. B. 15-19, 112-117, 188-190, 188 S. B. 15-22, 57, 79-85, 204 S. B. 68-76 and below, pages 35, 36.

Act of God

Husband and wife were jointly employed as butler and housekeeper at their employer's island summer home. During a hurricane they left the house in an attempt to get to the mainland and both were drowned. Finding that the demise of the decedents was primarily due to their being placed in a special zone of danger by virtue of their employment location, upheld. Dalin v. Burghard, ex rel., 262 App. Div. 783.

Balance, Fall Due to Loss of

The courts held loss of balance on a crowded sidewalk to be an accident: Unger v. N. Y. Sportwear Co., 243 App. Div. 659; 269 N. Y. Rep. 651; 188 S. B. 17.

Chill Was Held To Be Accidental in the Following Cases:

Changing from hot to cold room: Hart v. Rogers, 31 S. D. R. 583.

Digging in damp ground: McNulty v. National Exhibition Co., 236 App. Div. 864; 11 Ind. Bul. 445.

Dousing by cold water from bursting pipe: Kern v. Premier Coal Saving Device Corp., 246 App. Div. 661; 204 S. B. 51.

Drenching by rain storm while attending salesmen's training camp: Tallis v. National Cash Register Co., 238 App. Div. 879; 188 S. B. 17; drenching by rain storm while moving building: Lasky v. Frederick, 258 App. Div. 756; 204 S. B. 48.

Driving with head out of window during sleet storm: Warring v. Case-Kane, Inc., 258 App. Div. 838; 204 S. B. 47.

Falling in puddle of water during rainstorm: Karp v. West 21st St. Holding Corp., 253 App. Div. 851; 204 S. B. 50.

Gardening during rain storm: Dotola v. Hill, 257 App. Div. 870; 204 S. B. 48.

Immersion in river: Rist v. Larkin & Sangster, 171 App. Div. 71; 81 S. B. 253.

Kneeling on damp floor: Mintz v. Artistic Dyeing Co., 231 App. Div. 783; 177 S. B. 16.

Lying on floor of garage in draft repairing car: Robbins v. Enterprise Oil Co., Inc., 252 App. Div. 904; 278 N. Y. Rep. 611; 204 S. B. 45. See also Little v. Chapin Co., 260 App. Div. 817.

Opening window to relieve basement of furnace steam: Hocke v. Endee Management Corp., 269 N. Y. Rep. 592; 188 S. B. 16.

Operating elevator which stalled between floors for an hour and a half: Cook v. International Paper Co., 244 App. Div. 849; 14 Ind. Bul. 171.

Walking through cold open courtyard after repairing steam boiler: Leich v. Borchard Affiliations, 256 App. Div. 1019; 204 S. B. 49.

Working without boots in flooded excavation: Brennan v. Hockensmith Construction Co., 256 App. Div. 870; 281 N. Y. Rep. 703; 204 S. B. 43.

Working in very cold draft repairing elevator: Doshey v. Fire Companies Bldg., 20 S. D. R. 419.

Working in flooded basement and frequently going out into the cold weather: Gicking v. Mutual Life Ins. Co. of New York, 256 App. Div. 869; 204 S. B. 49.

Working in icy water: Christian v. State Conservation Comm., 191 App. Div. 635; 106 S. B. 32.

Working in refrigerators: Bak v. Kotok Fish Distributor, 261 App. Div. 862; Wolfe v. Brohman, 260 App. Div. 816; 285 N. Y. Rep. —

Working in store and struck by draft from overhead electric fan: Lurye v. Stern Bros. Department Store, 275 N. Y. 182; 250 App. Div. 792; 204 S. B. 46.

Working in wet clothes after fall into pool: Dougherty v. Decker Bros., 241 App. Div. 642; 13 Ind. Bul. 27.

Working in wet manhole: Baldwin v. McMullen Co., 232 App. Div. 714; 10 Ind. Bul. 126.

Chill Was Held Not To Be Accidental in the Following Cases:

Fighting fire and getting drenched: Doulin v. City of Saratoga Springs, 261 N. Y. Rep. 558; 188 S. B. 16.

Repairing sign in below zero weather after having worked in warm furnace pit: Peck v. Campbell, 251 App. Div. 914; 204 S. B. 50.

Sitting in draft: Friedberg v. Feinberg & Price, 239 App. Div. 867; 12 Ind. Bul. 168.

Wading: Barbaro v. Traymore Cafeteria, 36 S. D. R. 706; 222 App. Div. 785; 161 S. B. 14.

Wetting feet and working in winter storm: Johnson v. Alley, Johnson & Co., 36 S. D. R. 359; 220 App. Div. 791; 156 S. B. 15.

Working in preheater exposed to great heat: Lanphier v. Air Preheater Corp., 252 App. Div. 823; 278 N. Y. 403; 204 S. B. 43.

Working in rain and dampness: Bixby v. Cotswold Comfortable Co., 195 App. Div. 659; 106 S. B. 35.

Working in refrigerators: Lerner v. Rump Bros., 241 N. Y. 153; 140 S. B. 20; D'Oliveri v. Austin Nichols & Co., 211 App. Div. 295; 140 S. B. 24.

Contagion Was Held To Be Accidental

Matron in children's institution was stricken with scarlet fever four days after attending child afflicted with the disease: Gaites v. Society for the Prevention of Cruelty to Children, 251 App. Div. 761; 277 N. Y. Rep. 534; 204 S. B. 51.

Digestive Tract, Infection or Poisoning Through

For want of proof of accident, the Court of Appeals reversed award to a summer hotel employee disabled by typhoid fever: McDonald v. Belle Terre Lodge, 268 N. Y. Rep. 663; 188 S. B. 22; and for want of infection in the course of employment, award to a salesman infected by a typhoid fever carrier serving him in a restaurant: Johnson v. Smith, 263 N. Y. 10; 188 S. B. 22. A referee of the Department of Labor held that the admission of water polluted with typhoid

germs to a labor camp and the drinking of it by the camp laborers was an accident and awarded death benefits on account thereof: Schwartz v. McCleary, Wallin and Crouse, 118 S. B. 24, citing the final paragraph in O'Neil v. Carley Heater Co., 218 N. Y. 414; 81 S. B. 94; compare Scheerens v. Edwards & Son, 133 Misc. 616; 161 S. B. 16, and Brainard v. N. Y. State Dept. of Health, 33 S. D. R. 37; 140 S. B. 29. The Appellate Division affirmed award to the family of a waiter poisoned by food provided by his employer: Fitzpatrick v. Postal Restaurant Co., 30 S. D. R. 324; 208 App. Div. 822; 133 S. B. 78.

Exertion Was Held To Be Accidental in the Following Cases:

Bartender who pulled and lifted a heavy piece of ice and suffered ruptured blood vessel followed by cerebral hemorrhage and paralysis: Lauer v. Meenan, 255 App. Div. 738; 204 S. B. 57.

Domestic with preexisting coronary disease who manually pushed automobile up incline and fatally collapsed immediately thereafter due to coronary thrombosis: Herriott v. Phillips & Phillips, 254 App. Div. 609; 204 S. B. 59.

Doorman with preexisting cardiac condition who collapsed while assisting an incoming tenant with his baggage, etc.: Knoll v. 79 East 79th Street Corp., 260 App. Div. 825.

Driver with preexisting heart condition who unsuccessfully cranked truck and suffered fatal attack of coronary thrombosis shortly thereafter: Green v. Geiger, 253 App. Div. 469; 255 App. Div. 903; 280 N. Y. Rep. 610; 204 S. B. 52.

Express messenger with preexisting cardiac ailment who lifted plank weighing about one hundred and fifty pounds and suffered fatal heart collapse three minutes later: Golden v. Railway Express Agency, Inc., 255 App. Div. 735; 204 S. B. 58.

Groom who rode green saddle horse and suffered a ruptured intestine: Coleman v. Phipps, 255 App. Div. 909; 204 S. B. 57.

Janitor with preexisting arteriosclerosis who washed smoke damaged walls with hot water, washing powder and alcohol and suffered a dizzy spell followed by left hemiplegia: Rivenburg v. Morris Estate, 256 App. Div. 869; 204 S. B. 56.

Laborer who worked in excavation shoveling dirt into truck and fell dead from acute dilatation of the heart: Drake v. Tillingham-Moyer Co., 255 App. Div. 730; 204 S. B. 58.

Mechanic who lifted a chair weighing 200 pounds for the purpose of repairing it and felt a pain in his chest: Fitkalo v. American Express Concessions, Inc., 261 App. Div. 1023.

Pipe threader suffering from arteriosclerosis who worked overtime on a rush job and was stricken with heart attack: Kusel v. Eastern Bridie Iron & Steel Corp., 258 App. Div. 831; 283 N. Y. Rep. 671; 204 S. B. 52.

Steel worker who over-exerted himself while reaming the taphole of a blast furnace and died within an hour of coronary occlusion and myocarditis: Langford v. Republic Steel Corp., 258 App. Div. 1015; 204 S. B. 55.

Superintendent who lifted heavy oil burner and suffered abdominal pains which necessitated operation: Kuehnen v. Singer Arms Realty Corp., 255 App. Div. 739; 204 S. B. 571.

Tile setter who exerted himself lifting a heavy tile and further exerted himself in attempting to avoid falling from the roof on which he was placing the tile and died immediately thereafter of coronary thrombosis: Moore v. Federal-American Cement & Tile Co., 258 App. Div. 1011; 204 S. B. 56.

See also "Strain and Other Internal Injuries," below, page 32.

Exertion Was Held Not To Be Accidental in the Following Cases:

Blacksmith with preexisting heart condition who regularly climbed three flights of stairs in the course of his employment and suffered fatal heart attack while climbing them at quitting time: Arberger v. International Hydro-Electric Corp., 256 App. Div. 1019; 204 S. B. 56, and a blacksmith with preexisting heart condition who collapsed while shoeing a horse: La Fountain v. La Fountain, 259 App. Div. 1095; 284 N. Y. Rep. 729; 204 S. B. 54.

Laborer with preexisting coronary arterio sclerosis who collapsed while engaged in his regular occupation, pushing an overhead tree loaded with meat products weighing about 400 pounds: Dworak v. Greenbaum Co., 261 App. Div. 1022.

Fall Caused by Disease, Negligence, Sleepiness, Vertigo, Etc.

When an employee loses self control or consciousness because of disease and falls, incurring hurt, the fall and the injury resulting from it constitute an accident within the purview of the Workmen's Compensation Law: Mausert v. Albany Builders' Supply Co., 250 N. Y. 21; 161 S. B. 52; Barath v. Arnold Paint Co., 238 N. Y. Rep. 625; 133 S. B. 84, 85; Unger v. N. Y. Sportwear Co., 268 N. Y. Rep. 651; 188 S. B. 17; Santacroce v. Sag Harbor Brick Works, 182 App. Div. 442; 87 S. B. 49; Patsaros v. Eichler Brewing Co., 245 App. Div. 873; 204 S. B. 397; Kefford v. Federal Reserve Bank of New York, 246 App. Div. 660; 204 S. B. 61; but there must be something in the position or surroundings of the employee when the fall occurs, some risk specially assignable to the employment, if the accident is to be compensable: Andrews v. L. & S. Amusement Co., 253 N. Y. 97; 177 S. B. 122; Connelly v. Samaritan Hospital, 259 N. Y. 137; 177 S. B. 127; Frankel v. National 5, 10 and 25 Cent Stores, 268 N. Y. Rep. 509; 188 S. B. 99; Sculiy v. Linwood Amusement Co., 268 N. Y. Rep. 512; 188 S. B. 96; Jensen v. Railway Express Agency, 262 N. Y. Rep. 671; 188 S. B. 90; Collins v. Brooklyn Union Gas Co., 171 App. Div. 381; 81 S. B. 100.

Fall caused by disease was held accidental in the case of an employee enroute to a doctor for treatment for rash on legs resulting from conditions of employment: Goldberg v. 954 Marcy Corp., 251 App. Div. 904; 276 N. Y. 313; 204 S. B. 202.

For similar cases of fall, see 162 S. B. 52; 177 S. B. 131, 132, 156, 168; 188 S. B. 89; 204 S. B. 60.

Frostbite and Heat Prostration

Early decisions of the New York courts in workmen's compensation cases promptly determined frostbite and heat prostration to be accidents. Decisions earlier and later have dealt with the additional question, Has the frostbite or the heat prostation in the given case arisen "out of and in the course of employment"? For references covering both of these aspects see the titles, "Frostbite" and "Heat prostration" under "Out of and in the course of employment," below, pages 43, 44.

Infection

Dermatitis, anthrax, glanders, infections through blisters or abrasions, sulphuric acid poisoning and other skin contact troubles are now compensable as occupational disease: § 3, subd. 2, pars. 1, 16, 23, 26, 27, 28, below.

The Court of Appeals held ivy poisoning to be accidental: Plass v. Central N. E. Ry. Co., 226 N. Y. 449; 81 S. B. 205; 97 S. B. 234; also bursting of a blister permitting infection: Scoville v. Tolhurst Machine Works, 231 N. Y. 510; 106 S. B. 38; also infection of fingers while cleaning a urinal, the fingers having been previously cut at home: Horrigan v. Post-Standard Co., 224 N. Y. Rep. 620; 97 S. B. 31, 32; but held dry gangrene of a finger from constant dipping of it into a photographic solution not to be accidental: Jeffreyes v. Sager Co., 198 App. Div. 446; 233 N. Y. Rep. 535; 118 S. B. 26; found proof of accident as well as of causal relation to be insufficient in case of frog felon alleged to have been caused by constant use of a screw driver: Woodruff v. Howes Construction Co., 228 N. Y. 276; 106 S. B. 46; and reversed award for anthrax because of paucity of evidence: Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21; 234 N. Y. Rep. 615; 106 S. B. 41; 118 S. B. 29. It held dermatitis upon entrance of fur dyes into an accidental wound to be compensable: Hechtenthal v. Eisenberg & Halberstadt, 256 N. Y. Rep. 566; 177 S. B. 180; as had the Appellate Division in Karbowitz v. Weinstein & Son, 215 App. Div. 753; 149 S. B. 70.

The Appellate Division held the entrance of dermatitis germs through wounds due to turpentine burn and to the bite or scratch of a fish to be accidental: Noonan v. Paramount Broadway Corp., 235 App. Div. 646, 11 Ind. Bul. 161;

Schob v. Lockwood & Winant, 235 App. Div. 883; 11 Ind. Bul. 273; but contraction of dermatitis gradually from sulphuric acid of automobile batteries not to be accidental: Wright v. Used Car Exchange, 221 App. Div. 154; 156 S. B. 16.

The Department held dermatitis from contact with an asphaltum and naphtha solution to be accidental: Wood v. Price Fire & Waterproofing Co., 31 S. D. R. 601.

The courts, on ground of accident, affirmed awards for aggravation of disease by an antitoxin injection: Sanders v. Children's Aid Society, 238 App. Div. 746; 262 N. Y. Rep. 655; 188 S. B. 19, 92; for anthrax from hides: Hiers v. Hull Co., 178 App. Div. 350; 87 S. B. 52; for heart trouble caused by undulant fever germs entering a cut: Ingelfinger v. Dold Packing Co., 235 App. Div. 754; and for impetigo contagiosa contracted from a patient by a nurse: Gray v. Monticello Hebrew Hospital Assn., 240 App. Div. 794; 12 Ind. Bul. 241; for contraction of scarlet fever by a matron from children for whom she was caring: Gaites v. Society for Prevention of Cruelty to Children, 251 App. Div. 761; 277 N. Y. Rep. 534; 204 S. B. 51.

Gonorrheal infection of eye suffered by a hospital interne while attending patient afflicted with venereal disease was held to be accidental: Turitto v. St. Mary's Hospital, 257 App. Div. 1094; 204 S. B. 64.

See also title, "Disease, Infection, Etc., Accelerated by or Resulting from Accident," below.

Inhalation of Fumes, Dust and Other Deleterious Substances

The Court of Appeals held inhalation of bromide of methyl gas from a refrigerating machine to have been accidental in Senoff v. Savage Arms Corp., 261 N. Y. Rep. 627; 188 S. B. 18; also inhalation of coal gas: O'Dell v. Adirondack Electric Power Co., 223 N. Y. Rep. 686; 97 S. B. 29; and of poisonous factory fumes: Gray v. Semet-Solvay Co., 231 N. Y. Rep. 518; 106 S. B. 36, 37; and of carbon monoxide: Michelfelder v. Van Alstyne, 245 N. Y. Rep. 569; 156 S. B. 21; Reichard v. Franklin Mfg. Co., 223 App. Div. 797; 249 N. Y. Rep. 525; 156 S. B. 19.

The Appellate Division held death from bronchitis caused by fumes from a trench containing ammonia and chloride of lime to be accidental: McNiven v. Highland Hospital, 231 App. Div. 782; 177 S. B. 17, 172; also death of a garage employee from carbon monoxide of running motors: Cantor v. Elsmere Garage, 214 App. Div. 351; 140 S. B. 27; but held injury to a dye factory employee by sulphuric oxide fumes not to be: Rosenthal v. National Aniline & Chemical Co., 216 App. Div. 588; 149 S. B. 20.

For other inhalation cases turning upon the question of accident see 162 S. B. 50, 51, 72; 177 S. B. 17, 172; 188 S. B. 59, 62; 204 S. B. 92.

Poisoning by carbon monoxide and other fumes and silicosis or other injury by dust are now compensable as occupational disease: § 3, subd. 2, pars. 10-28, §§ 65-72, below.

The Appellate Division held injury by inhalation of soot to be accidental: White v. Board of Education, 236 App. Div. 868; 11 Ind. Bul. 448; and injury by inhalation of chemical particles: Jones v. Aircraft Products Co., 214 App. Div. 829; 140 S. B. 29; but inhalation of grindstone dust not to be: Thayer v. Maydale, 215 App. Div. 854; 149 S. B. 13. It reversed an award for injury by vanadium ore dust because the case was in admiralty: Triscari v. Huron Stevedoring Co., 193 App. Div. 920; 106 S. B. 36. See also the coal dust case: Robertson v. Pettit & Sons, 215 App. Div. 739; 149 S. B. 21, 22; and silicosis case: Janusz v. Buffalo Porcelain Enameling Corp., 227 App. Div. 833; 177 S. B. 17, 62.

The Appellate Division held inhalation of glanders from a live horse not to be accidental: Richardson v. Greenberg, 188 App. Div. 248; 97 S. B. 36.

Shock, Fright, Excitement, Etc.

The Court of Appeals affirmed award for disablement by cerebral apoplexy or psycho-neurosis due to fright: Pickerell v. Schumacher, 242 N. Y. Rep. 577; 149 S. B. 16, 17. The Appellate Division affirmed awards to women employees for injuries from fright: Butkus v. Berzetes, 33 S. D. R. 108; 216 App. Div. 777;

149 S. B. 17; 227 App. Div. 680; 177 S. B. 17; Armstrong v. American Red Cross, 202 App. Div. 766; 133 S. B. 29; London v. Casino Waist Co., 181 App. Div. 962; 87 S. B. 49.

The courts affirmed awards for deaths from excitement and exertion caused by fires: Easer v. Pratt, 261 N. Y. Rep. 628; 188 S. B. 99; Andrews v. Emporium Forestry Co., 250 N. Y. Rep. 592; 161 S. B. 31; Thompson v. City of Binghamton, 218 App. Div. 451; 149 S. B. 14; Shapiro v. Moss & Steinberg, 227 App. Div. 681; 177 S. B. 17; Rude v. City of Fulton, 225 App. Div. 840; 177 S. B. 17; also from excitement and exertion of making a speech and climbing stairs: Berman v. Wasserman Co., 236 App. Div. 767; 11 Ind. Bul. 386; and of an altercation: Blass v. L. I. Parkway, 222 App. Div. 706; 161 S. B. 14; and of chasing a thief: State Treasurer v. Factors Delivery Co., 210 App. Div. 822; 133 S. B. 27; also for paralysis caused by a struggle with a horse: Chudomel v. W. B. L. Coal Co., 221 App. Div. 824; 161 S. B. 15; but denied awards for deaths from excitement in O'Conneli v. Adirondack E. P. Co., 193 App. Div. 582; 106 S. B. 29; Licciardi v. Kayser Co., 217 App. Div. 704; 149 S. B. 17; and Inciardi v. Bank of America, 241 App. Div. 902; 185 S. B. 472.

Mental stress was held to be accidental in the case of an employee who as witness for his employer in court was subjected to exhaustive cross-examination and suffered immediate fatal coronary occlusion: Church v. Westchester County Park Comn., 253 App. Div. 859; 204 S. B. 2.

Laborer who developed dementia praecox following undiagnosed back injury which entailed long litigation and was accompanied by privation was awarded compensation for consequent disability: Rodriguez v. New York Dock Co., 256 App. Div. 875; 204 S. B. 152.

The courts have affirmed awards for electric shock: Leary v. Daley & Co., 261 N. Y. Rep. 124; 188 S. B. 124; Roblee v. N. Y. Telephone Co., 235 App. Div. 754; 11 Ind. Bul. 237; Stack v. Watson Elevator Co., 232 App. Div. 712; 10 Ind. Bul. 128; Kimlin v. Upper Hudson Electric Co., 224 App. Div. 800; 161 S. B. 72; Andress v. Art Metal Construction Co., 219 App. Div. 754; 156 S. B. 18, and Regan v. Robins D. D. & R. Co., 218 App. Div. 806; 156 S. B. 18. See 162 S. B. 8.

Strain and Other Internal Injuries

Strain, the most common cause of invisible injuries to internal organs and parts of the body, is accidental: Jordan v. Decorative Co., 230 N. Y. 522; 106 S. B. 233. Organs or parts weak or malformed, though not morbid, give way under great physical exertion. Difficulties of evidence characterize such cases. Injury need not "present a visible or external sign": Fowler v. Risedorph Bottling Co., 175 App. Div. 224; 87 S. B. 232. External bruising may be accompanied by internal injuries when the hurt is by a blow or a fall. Cases illustrating injury to brain, heart, intestines, joints, sacro-iliac and other, kidneys, pleura, stomach, etc., are alphabetically presented in each Special Bulletin. Hernia is under "Intestines." See Index Bulletin, No. 162, pages 10, 83-86. For court decisions later than those of No. 162, see 177 S. B. 18, 19, 182-187; 188 S. B. 99, 100, 102, 103; 204 S. B. 158.

For hernia as an occupational disease, see Foster v. Gillinder Bros., Inc., 252 App. Div. 903; 278 N. Y. 348; 204 S. B. 201; Bettcher v. du Pont de Nemours & Co., 255 App. Div. 734; 204 S. B. 202.

See also title, "Exertion," above, page 29.

DISEASE, INFECTION, ETC., ACCELERATED BY OR RESULTING FROM ACCIDENT

In a multitude of cases the Department of Labor, without reversal by the courts, has held that "such disease or infection as may naturally and unavoidably result" from an accidental injury includes disease antedating the accident if aggravated, accelerated, developed or hastened by it. For example, a heavy strain or other accident may develop an unknown heart defect and cause sudden death, or injury by the upsetting of an automobile may light up latent tuberculosis and cause life-long disability.

The courts affirmed awards in the following cases:

Crushed finger followed by infection which activated a dormant tubercular condition: Salli v. Standard Wrecking and Salvage Co., 254 App. Div. 789; 204 S. B. 161.

Gonorrheal infection of eye suffered by hospital interne while attending patient afflicted with venereal disease: Turitto v. St. Mary's Hospital, 257 App. Div. 1094; 204 S. B. 64.

Laceration of thumb followed by infection and fatal malignant endocarditis: McCarthy v. Worthington Pump & Machinery Corp., 254 App. Div. 612; 204 S. B. 153.

Lymphangitis infection of hand suffered by machinist whose work exposed him to flying particles of emery and steel and who felt a pricking sensation in his finger while operating a machine: Richardson v. Globe Forge & Foundries, Inc., 258 App. Div. 1016; 204 S. B. 64.

Syphilis suffered by nurse in children's ward who pricked finger while attending infant afflicted with congenital syphilis: Waterman v. Jamaica Hospital, 257 App. Div. 1087; 204 S. B. 161.

Wound of hand followed by general septicemia: Voelz v. Bethlehem Steel Co., 255 App. Div. 733; 204 S. B. 65.

Disability may be partially or wholly due to disease concurrent with but not consequential from an accident: Audi v. N. Y. Central R. R. Co., 212 App. Div. 846; 215 App. Div. 742; 156 S. B. 176.

Cases illustrating the varied relations of accident and disease are alphabetically presented under the names of the several organs or parts of the body in each Special Bulletin. General citations are in Special Bulletin No. 162, pages 72-82, 198. For court decisions later than those of No. 162, see 177 S. B. 121-132, 150-182, 279, 280; 188 S. B. 40-45, 89, 95-101, 106-112; 204 S. B. 150-161. For falls caused by disease, see above, page 30.

CONSEQUENTIAL ACCIDENTS

Death or increase and prolongation of disability by a further accident caused by weakness, illness or disease assignable to the original accident is compensable, such as a fall, or refracture of a bone or mental trouble: Malgieri v. General Electric Co., 258 N. Y. Rep. 620; 177 S. B. 158, 159; Ruzsjak v. Metal Stamping Co., 259 N. Y. Rep. 575; 185 S. B. 31; Anderson v. Babcock & Wilcox Co., 256 N. Y. 146; 185 S. B. 168; Chiodo v. Newhall Co., 254 N. Y. Rep. 534; 185 S. B. 180; Prentice v. Weeks, 239 App. Div. 227; 264 N. Y. Rep. 507; 185 S. B. 180; Phillips v. Holmes Express Co., 190 App. Div. 336; 229 N. Y. Rep. 527; 118 S. B. 170; 98 S. B. 68; Colvin v. Emmons & Whitehead, 216 App. Div. 577; 149 S. B. 214; Ring v. Corona Fuel & Supply Co., 241 App. Div. 635; 264 N. Y. Rep. 677; 188 S. B. 94; Murray v. Interborough R. T. Co., 249 App. Div. 883; 253 App. Div. 848; 204 S. B. 162.

In the following cases two or more accidents were held to be:

Consequential: Where claimant refractured his leg by a fall while still disabled and using crutches as result of the first accident: Hall v. Chapman & Chapman, 257 App. Div. 1091; 204 S. B. 162.

Where riveter sustained injuries to both hands requiring heavy bandages and was therefore unable to check fall at home: Murray v. Interborough R. T. Co., 253 App. Div. 848; 204 S. B. 162.

Where second hernia suffered by janitor was found to be recurrence of a hernia incurred eight months earlier: Papadimitriou v. 505 Lincoln Place, Inc., 257 App. Div. 1090: 204 S. B. 171.

Non-Consequential: Where lineman paralyzed by accident was fatally injured in collision with taxicab while returning in wheel chair from friendly visit: Baker v. Niagara Falls Power Co., 256 App. Div. 865; 204 S. B. 165.

Contributory: Where punch press operator sustained accident to his back for which he was paid compensation and subsequently while working for second

employer strained same region of his back with attendant disability. Apportionment of award between two carriers affirmed. Rusin v. Consolidated Aircraft Corp. and Auto Wheel Coaster Co., 254 App. Div. 787; 204 S. B. 166.

Non-Contributory: Where driver who sustained a sacro-iliac sprain in 1937 and, despite persistent pain, returned to work about nine months later became totally disabled after picking up a boiler in course of his work. Carrier on risk at time of the second accident accepted liability for resultant total disability; carrier on risk at time of the original accident was charged with award for subsequent partial disability. Patrick v. Shapiro, Inc., 258 App. Div. 1011; 204 S. B. 165. See also Geroe v. Cohen, d/b Ace Milk Co., 262 App. Div. 785.

Disability or Death Ensuing Upon Treatment for Conditions Unrelated, as Well as Related, to Accident

Death or increase and prolongation of disability by a further accident or by transmissible disease due to, or incidental to, medical care and treatment necessitated by the original accident is compensable, such as death from operation or anaesthesia or from a fall or exposure to cold while enroute to or from a physician's office or from typhoid or other transmissible disease contracted in hospital: Lofstedt v. U. S. Gypsum Co., 258 N. Y. 222; 185 S. B. 29; Huhn v. Gehnrich Indirect Heat Oven Co., 250 N. Y. Rep. 568; 161 S. B. 182, 183; Pecorella v. Bartenbach, 249 N. Y. Rep. 610; 161 S. B. 181, 182; Pardo v. Muccini & Decker, 266 N. Y. Rep. 564; 185 S. B. 376; Sherman v. Orwasher, 229 App. Div. 29; 177 S. B. 166; Newkumet v. Pine & Sons, 224 App. Div. 803; 161 S. B. 183; Carr v. Donner Steel Co., 27 S. D. R. 195; 202 App. Div. 768; 118 S. B. 160.

Awards were affirmed in the following cases: Where painter sustained pelvic injuries and while in hospital developed gangrenous appendicitis, operation for which proved fatal: Chambers v. Universal Advertising Corp., 253 App. Div. 854; 204 S. B. 173.

Where laborer sustained right hernia and was operated on by carrier's physician for unrelated left hernia as well: Gregory v. Kennedy Construction Co., 254 App. Div. 610; 204 S. B. 172.

Where crane operator sustained left hernia and the surgeon also repaired an existing right hernia, death ensuing from embolism: Natello v. Hockensmith Contracting Co., Inc., 259 App. Div. 769; 204 S. B. 172.

For these and other consequential accident cases, see 204 S. B. 162–173; 188 S. B. 94, 102, 103; 185 S. B. 29–31, 167–185; 177 S. B. 98, 99, 137, 158, 159, 177; 161 S. B. 94, 181–183; 156 S. B. 230, 231; 149 S. B. 212–216; 118 S. B. 160, 170, 171. They are in contrast with subsequent accidents that are not consequential: 161 S. B. 174–181; 156 S. B. 188, 189, 294, 295; 149 S. B. 138, 168–170, 212, 213, 232, 233, 269; 140 S. B. 201, 208. Unlike the original accidents, consequential accidents may occur anywhere and any time and be compensable.

For cases involving schedule loss in which the question of previous disability figured, see § 15, Subd. 7, below, and notes thereunder.

"ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT"

These nine words broaden the coverage of the employments enumerated in § 3 to include work, occupations, conditions and occurrences incidental to them, such as putting out a fire in a factory engaged in the manufacture of gloves or dancing at a dinner given by a department store having four or more workmen or operatives to its employees. For conjunctive force of the word "and" in the phrase, consult Harris v. Cheney Hammer Corp., 221 App. Div. 199; 156 S. B. 44; and McMahon v. Mack, 220 App. Div. 375; 156 S. B. 41. Line is drawn between incidentalness and non-incidentalness, with citation of precedents, in Newman v. Newman, 169 App. Div. 745; 81 S. B. 83; and Gleisner v. Gross & Herbener, 170 App. Div. 37; 81 S. B. 89. Important cases illustrative of the principle are referred to in the notes on operation of vehicles, § 3, gr. 7.

Injuries by third parties are expressly covered by § 29, and injuries connected with intoxication, suicidal intent, and violations of laws, orders, by § 10, which see. Consult 162 S. B. 21–65; 177 S. B. 49–60, 68–133; 188 S. B. 36–39, 49–92; 204 S. B. 68–149.

The following two alphabetical presentations, first of incidental and second of non-incidental work, etc., should be compared with each other in examining particular topics:

Incidental Work, Occupations, Conditions and Occurrences

In the following cases the accidental injuries have been held to be incidental and hence to be compensable:

Adjoining premises, object falling from: Filitti v. Lerode Homes Corp., 244 N. Y. 291; 156 S. B. 63; Malena v. Leff, 265 N. Y. Rep. 533; 188 S. B. 90; Bandassi v. Molla & Arigoni, 200 App. Div. 266; 234 N. Y. Rep. 554; 118 S. B. 121; Domres v. Syracuse Safe Co., 211 App. Div. 823; 240 N. Y. Rep. 611; 140 S. B. 57, 58; but compare this topic under Non-incidental Work, Etc., below.

Air, seeking fresh: Montgomery v. Bartholomay Milk Co., 260 N. Y. Rep. 664; 11 Ind. Bul. 63, 472; Fuller v. Title Guarantee & Trust Co., 229 App. Div. 816; 223 App. Div. 173; 156 S. B. 65; 177 S. B. 97: Moschinger v. Heide, Inc., 256 App. Div. 1019; 204 S. B. 132.

Antitoxin in typhoid epidemic, injection: Sanders v. Children's Aid Society, 238 App. Div. 746; 262 N. Y. Rep. 655; 188 S. B. 19, 92.

Apples on cemetery ground, harvesting: Hunt v. Boxwood Cemetery Assn., 235 App. Div. 753; 11 Ind. Bul. 234.

Asphyxiation: Garage watchman who was found asphyxiated in a taxicab with motor and radio running: Shapiro v. Mural Transportation Corp., 257 App. Div. 1088; 204 S. B. 92.

Truck drivers employed by dealer in gasoline who suffered asphyxiation following unexplained entry into gasoline tank: Dunn and Smith v. Hambleton Terminal Corp., 257 App. Div. 1095; 204 S. B. 92.

Assault, connected with employment, disputes about methods of work:

By co-employees: Humphrey v. Tietjen & Stefiin Milk Co., 235 App. Div. 470; 261 N. Y. Rep. 549; 177 S. B. 113; 188 S. B. 80; Rydeen v. Monarch Furniture Co., 240 N. Y. 295; 140 S. B. 52; Heitz v. Ruppert, 218 N. Y. 148; 81 S. B. 214; Fried v. Quinlan, 5 Ind. Bul. 137; 32 S. D. R. 715; 214 App. Div. 837; 242 N. Y. Rep. 496; 149 S. B. 51; Verschleiser v. Stern & Son, 229 N. Y. 192; 106 S. B. 121; Carbone v. Loft, 219 N. Y. Rep. 579; 81 S. B. 217; Haverhals v. Badman, 268 N. Y. Rep. 660; 188 S. B. 80; Levy v. World Telegram, 259 App. Div. 943; 285 N. Y. Rep. —; 204 S. B. 68; Heimroth v. Elk Transportation Corp., Inc., 259 App. Div. 944; 204 S. B. 578; Katz v. Reissman Rothman Corp., 261 App. Div. 862.

By foremen: Knocks v. Metal Package Corp., 231 N. Y. 78; 106 S. B. 130; Mariano v. Krasnoger Bros., 190 App. Div. 65; 228 N. Y. Rep. 609; 97 S. B. 118.

By subordinates: Field v. Charmette Knitted Fabrics Co., 35 S. D. R. 707; 245 N. Y. 139; 156 S. B. 40; Loonsk v. Loonsk Bros., 249 N. Y. Rep. 519; 161 S. B. 20, 39; Yume v. Knickerbocker Portland Cement Co., 3 S. D. R. 353; 169 App. Div. 905; 81 S. B. 209; Richards v. Mahlstedt Lumber & Coal Co., 240 App. Div. 741; 12 Ind. Bul. 196; Alper v. Premier Shoe Co., 239 App. Div. 867; 12 Ind. Bul. 167; Steubben v. Darlington, 238 App. Div. 886; 12 Ind. Bul. 83.

By strike sympathizers: Crippen v. Press Co., 254 N. Y. Rep. 535; 177 S. B. 84; Tarantzis v. Vanta Bros., 240 App. Div. 795; 12 Ind. Bul. 243.

By disturbers of the peace: Ruppert v. Plattdeutsche Volksfest Verein, 263 N. Y. 338; 188 S. B. 68.

By elevator passengers: Boyle v. Broadway Realty Corp., 235 App. Div. 645; 11 Ind. Bul. 160.

By insane persons: Katz v. Kadans & Co., 232 N. Y. 420; 118 S. B. 62; Thomas v. U. S. Trucking Co., 250 N. Y. Rep. 567; 161 S. B. 40; Charbazian v. Regina Novelty Corp., 257 App. Div. 1097; 204 S. B. 72.

By rival cabman: Boyle v. Yellow Taxi Corp., 260 N. Y. Rep. 575; 177 S. B. 116, 117; 188 S. B. 83.

By robbers: Greenberg v. Voit, 250 N. Y. Rep. 543; 161 S. B. 40; Clifford and Yarrington v. Marine Trust Co., 249 N. Y. Rep. 526; 161 S. B. 40; Mason v. Scheffer, 203 App. Div. 332; 118 S. B. 66; Rosmuth v. American Radiator Co., 201 App. Div. 207; 118 S. B. 106; Spang v. Broadway B. & M. Co., 182 App. Div. 443; 87 S. B. 111; Lanni v. Amsterdam Building Co., 217 App. Div. 278; 149 S. B. 55, 56; Walsh v. Brooklyn Eagle, 236 App. Div. 876; 262 N. Y. Rep. 657; 185 S. B. 33; Morgan v. Bergin, 262 N. Y. Rep. 673; 188 S. B. 83.

By other outsiders: Sassano v. Paino, 226 N. Y. Rep. 699; 97 S. B. 117; Pendl v. Hacnel, 229 App. Div. 52; 177 S. B. 102; appeal dismissed, 254 N. Y. Rep. 606; Weinberg v. Eagle Clothes, 268 N. Y. Rep. 511; 188 S. B. 84; Berresi v. Ryan, 247 App. Div. 845; 188 S. B. 82; Rothman v. Surprise Wet Wash Laundry, 240 App. Div. 741; 12 Ind. Bul. 196; Garnes v. Feeney & Sheehan Bldg. Co., 236 App. Div. 767; 185 S. B. 486; Rossi v. Waryold, 235 App. Div. 645; 11 Ind. Bul. 162; Dade v. N. Y. Central R. R. Co., 210 App. Div. 508; 133 S. B. 146; Harnett v. Steen Co., 2 S. D. R. 492; 169 App. Div. 105; 81 S. B. 401.

For case involving assault of salesman in public tavern while keeping business appointment there, see Christiansen v. Hill Reproduction Co., 262 App. Div. 379, July 2, 1941.

Compare "Assault not connected with work" under "Non-incidental Work, Etc.," below. For fuller information re assault cases, see 162 S. B. 42–45; 177 S. B. 112–117, 188–190; 188 S. B. 57, 68, 79–85; 204 S. B. 68–76.

Automobiles, operation of: Driving car of mechanic incidentally to mechanic's driving and adjusting injured employee's car: Goldberger v. Goldberger, 26 S. D. R. 498; 200 App. Div. 190; 118 S. B. 132; 133 S. B. 79; remitted on other grounds; using own car in employer's service: Martin v. Card & Co., 193 App. Div. 6; 106 S. B. 152. Compare this title under "Non-incidental Work, Etc.," below. See also 162 S. B. 33; 177 S. B. 305; 188 S. B. 56, 73; 204 S. B. 191.

Ball playing: Ade v. Rochester G. & E. Co., Case No. 700641-R; 118 S. B. 126; Grannis v. Grebe Co., 228 App. Div. 740; 177 S. B. 98; Huber v. Eagle Stationery Corp., 254 App. Div. 788. Compare this title under "Non-incidental Work, Etc.," below.

Bandits and police, stray bullet from fight between: Greenberg v. Voit, 250 N. Y. Rep. 543; 161 S. B. 40.

Bathing, washing up, etc.: Sexton v. Public Service Comn., 180 App. Div. 911; 87 S. B. 159; Wills v. Havens Plumbing Co., 29 S. D. R. 607; 207 App. Div. 883; 133 S. B. 82; Marco v. News Syndicate Co., 257 App. Div. 887; 204 S. B. 121. Compare this title under "Non-incidental Work, Etc.," below.

Beans, pulling for cannery: Clarke v. Sherman, 15 S. D. R. 602; 184 App. Div. 921; 97 S. B. 84.

Beef, unloading from car: Meyer v. Morris & Co., 6 S. D. R. 334; 173 App. Div. 990; 219 N. Y. Rep. 647; 81 S. B. 195.

Bonfire, warming self by: Hannon v. Consol. Telegraph & Electric Subway Co., 227 App. Div. 679; 177 S. B. 97; Strand v. Harris Structural Steel Co., 234 App. Div. 341; 260 App. Div. 516.

Boys, chasing mischievous: O'Brien v. Shore Road Hospital, 275 N. Y. Rep. 570; 204 S. B. 78; Hendricks v. Seeman Bros., 170 App. Div. 133; 81 S. B. 191; Liddon v. Braas Bros., 214 App. Div. 840; 149 S. B. 101; Schreiger v. L. R. & E. Realty Corp., 32 S. D. R. 729; 140 S. B. 85.

Breakfast, taking co-employee to: Terrell v. Acco Taxicab Co., Death Case, No. 375745; 190 App. Div. 886; 97 S. B. 136.

Call, employee subject to: Crippen v. Press Co., 228 App. Div. 727; 254 N. Y. Rep. 535; 177 S. B. 84. See also "Living on employment premises," below.

Call of nature: Clriello v. Great Lakes D. & D. Co., 231 N. Y. Rep. 556; 106 S. B. 111; Krawczyk v. MacNamara, 226 N. Y. Rep. 567; 97 S. B. 108; DeFllippis v. Falkenberg, 170 App. Div. 153; 81 S. B. 95; reversed on other grounds, 219 N. Y. 581; Dudenhausen v. Newcombe Oil Co., 217 App. Dlv. 707; 149 S. B. 60; Penn v. Lewis, 259 App. Div. 944; 284 N. Y. Rep. 614; 204 S. B. 76. See also 162 S. B. 30.

Carrying employer's money or goods. See "Casual tasks," "Coming to or leaving work," "Money of employer," "Traveling."

Casual tasks out of hours: Grieb v. Hammerle, 222 N. Y. 382; 87 S. B. 149; Jessup v. Wrigley, 250 N. Y. Rep. 563; 161 S. B. 37; Clow v. Keith's Fordham Theatre, 247 N. Y. Rep. 583; 156 S. B. 55; McCarthy v. Walsh Construction Co., 254 N. Y. Rep. 608; 177 S. B. 111; MacDonald v. Grand Battery & Ignition Service, 254 N. Y. Rep. 605; 177 S. B. 92; Morey v. Allendale School, 227 App. Div. 676; 177 S. B. 105; Graves v. Northwood Mfg. Co., 228 App. Div. 741; 177 S. B. 101; Schwimmer v. Kammerman & Kaminsky, 262 N. Y. 104; 188 S. B. 54. See "Errands," below. See also 204 S. B. 89–91; 188 S. B. 54; 177 S. B. 295; 162 S. B. 39, 40; 161 S. B. 38; 140 S. B. 49; 133 S. B. 69; 118 S. B. 100, 101. Compare this title under "Non-incidental Work, Etc.," below.

Chill. See above, page 27.

Cigarette. See Smoking; Tobacco.

Clerical work: Joyce v. Eastman Kodak Co., 182 App. Dlv. 354; 231 N. Y. Rep. 634; 97 S. B. 82; award reversed for withdrawal of claim, 238 N. Y. 142; 133 S. B. 226.

Co-employee, unintentional injury by (see also Assault; Horseplay): Wakefield v. World-Telegram, 274 N. Y. 517; 204 S. B. 72; Heitz v. Ruppert Brewing Co., 218 N. Y. 148; 81 S. B. 214; Laurino v. Donovan, 226 N. Y. Rep. 700; 97 S. B. 127; Markell v. Green Felt Shoe Co., 221 N. Y. Rep. 493; 87 S. B. 147. See also 204 S. B. 68; 188 S. B. 79; 162 S. B. 46, 47; 133 S. B. 79; 118 S. B. 117, 120; 97 S. B. 126. Compare this title under "Non-Incidental Work, Etc.," below.

Coffee, going out for (see also Lunch and lunch Interval; Travelling outside employer's plant): Gilloughly v. Standard Arch Co., 228 App. Div. 740; 177 S. B. 86; Tomich v. Bee Line, 229 App. Dlv. 816; 177 S. B. 86. Compare same title under "Non-incidental Work, Etc.," below.

Collecting: See "Money or other property, carrying, collecting, etc.," below, page 45.

Coming to or leaving work (see also Traveling outside employer's premises): In cases of accidental injury to employees while coming to or leaving work, the courts have construed the term "engaged" in subdivision four above with the term "arising out of and in the course of" in this subdivision. As a general rule such injuries, in order to be compensable, must occur on the employer's premises and must occur within reasonable time before beginning or after quitting work and without intervening pursuit other than the employment: Lynch v. City of New York, 242 N. Y. 115; 149 S. B. 40; Gillette v. Rochester Vulcanite Paving Co., 224 App. Div. 319; affd., 249 N. Y. Rep. 608; 161 S. B. 27; Broderick v. Colon & Co., 255 N. Y. Rep. 609; 177 S. B. 68; Lasher v. Primo Producing Co., 252 N. Y. Rep. 629; 177 S. B. 69; Schroder v. Verona Operating Corp., 264 N. Y. Rep. 506; 188 S. B. 47; Bodie v. N. Y. & Queens Electric L. & P. Co., 264 N. Y. Rep. 556; 188 S. B. 47; Byrne v. Grain Handling Corp., 272 N. Y. Rep. 548; 204 S. B. 84; Schwartz v. State of New York, 251 App. Div. 634; 277 N. Y. Rep. 567; 17 Ind. Bul. 151; Carroll v. Stokes, 238 App. Div. 886; 12 Ind. Bul. 80.

The employer owes the employee opportunity "to separate himself from the plant, its animosities and dangers": Field v. Charmette Knitted Fabric Co., 245 N. Y. 139; 156 S. B. 40; Goldstein v. Cohen, 225 App. Div. 838, 177 S. B. 74. An injury to an employee in the common passageways or elevators or upon the common stairways of the building in which his employer has quarters is compensable: Ross v. Howieson, 198 App. Div. 674; 232 N. Y. Rep. 604; 118 S. B. 75; Martin v. Metropolitan Life Ins. Co., 197 App. Div. 382; 233 N. Y. Rep. 653; 118 S. B. 79; Kantor v. Armstrong Publishing Co., 236 App. Div. 749; 177 S. B. 74.

§ 2, Subd. 7 "Arising Out of and in the Course of"

Injury to an employee reporting for signature of his time card is compensable: Freitag v. American Ry. Express Co., 30 S. D. R. 444; 209 App. Div. 233; 239 N. Y. Rep. 529; 133 S. B. 102; also injury to an employee carrying his employer's money or after or before performing an errand for his employer while enroute to or from the premises of his employment outside regular work hours: Wilbur v. Fonda, Johnstown & Gloversville R. R. Co., 208 App. Div. 249; 133 S. B. 58; Grieb v. Hammerle, 222 N. Y. 382; 87 S. B. 149; Clow v. Keith's Fordham Theatre. 247 N. Y. Rep. 583; 156 S. B. 55; McCarthy v. Walsh Construction Co., 254 N. Y. Rep. 608; 177 S. B. 111; Webster v. Rochester Ice & Cold Storage Utilities, 226 App. Div. 836; 177 S. B. 104; Schwimmer v. Kammerman & Kaminsky, 262 N. Y. 104; also injury to a commission salesman on the way to see a prospective customer: Harby v. Marwell Bros., 203 App. Div. 525; 235 N. Y. Rep. 504; 118 S. B. 68; and a produce solicitor returning home after midnight: Crowell v. American Fruit Growers, 253 N. Y. Rep. 543; 177 S. B. 85; and to an employee returning home in a car driven by the employer after working all night: Frank v. Economy Sales Co., 274 N. Y. Rep. 515; 204 S. B. 83; also injury to a town teamster setting out from his barn: Brandow v. Town of Coxsackie, 5 Ind. Bul. 194; 242 N. Y. Rep. 578; 149 S. B. 44, 45; and a town road worker on the way home: Carpenter v. Town of Lindley, 226 App. Div. 835; 177 S. B. 83; also injury to an employee while being transported to or from work by his employer, such transportation being part of, or incident to, the employment contract: Van Gee v. Korts, 252 N. Y. 241; 177 S. B. 75; Littler v. Fuller Co., 223 N. Y. 369; 95 S. B. 147; 97 S. B. 97; Onisk v. Knaust Bros., 225 App. Div. 186; 250 N. Y. Rep. 569; 161 S. B. 25; Heaney v. Carlin Construction Co., 269 N. Y. 93; 188 S. B. 53; certiorari granted 298 U. S. 637; judgment affirmed 299 U. S. 41; 204 S. B. 553; Dingfeldt v. Albee Godfrey Whale Creek Co., 272 N. Y. Rep. 623; 301 U. S. 687, 715; 204 S. B. 555; also injury to a traveling auditor setting out from home in automobile assigned to him by corporation: DeCicco v. Rubel Corp., 275 N. Y. Rep. 576; 204 S. B. 139; to a sales engineer leaving home of president of employer corporation in his own car: Van de Bogart v. Onondaga Litholite Co., 274 N. Y. Rep. 595; 204 S. B. 139.

Injury by a striker or strike sympathizer to a strike breaker off the employer's premises is compensable if the injured employee is subject to call at all hours: Crippen v. Press Co., 254 N. Y. Rep. 535; 177 S. B. 84.

The Appellate Division reversed disallowance of claim for death of a chief engineer of a construction job killed while riding in his own automobile enroute from his home to the job. Decedent was also the chief estimator for his employer and had a private office at the employer's New York City address. He had no regular hours. On the night before his death, decedent arrived home from the construction job at 11 p.m. and on the following morning left at 6 a.m. for the job. He had done some work at home that night and at time of the accident had in his pockets papers, memoranda and petty cash belonging to the employer. The court, in remitting the case to the Industrial Board, stated that the decedent was not a plant worker or one whose efforts in behalf of his employer were confined to a fixed location. Williams v. Gallow, Inc., 261 App. Div. 765. See also Graf v. Iverson Lumber Co., 262 App. Div. 787.

Awards of compensation for accidental injuries in the following cases were affirmed: A painter who worked late upon request of his employer on promise that he would be taken home and who sustained injuries while crossing street in front of his home, point to which he was driven: Sihler v. Lincoln-Alliance Bank & Trust Co., 255 App. Div. 415; 280 N. Y. 173; 204 S. B. 80; a bricklayer waiting on job site during rain storm before beginning work pursuant to instructions and injured by runaway compressor: Zwilling v. Slotnik Co., 254 App. Div. 792; 204 S. B. 149; a laborer returning from lunch to meet his employer's truck at appointed place: Sheehan v. Board of Trustees, Village of Schuylerville, 256 App. Div. 148; appeal dismissed, 281 N. Y. Rep. 613; 204 S. B. 78; a steam shovel operator driving to work early with employer's tools in his car intent on repairing a steam shovel: Stratton v. Broome County Highway Dept., 255 App. Div. 920; 204 S. B. 85; a domestic returning to her employer's residence after her day off who slipped at entrance of the building: Swanson v. Campbell, 254 App. Div. 609; 204 S. B. 82; a door to door canvasser who slipped and fell on the street while on her way from her home to meet her crew manager at a

designated street corner to be transported to a certain assigned territory for work: Barbarie v. Emulso Corp., 260 App. Div. 819.

The commission expressly stated the principles applicable to cases of coming to or quitting work in Hotaling v. Standard Oil Co. of N. Y., 6 S. D. R. 308; 81 S. B. 82, and DiPaolo v. Crimmins Construction Co., 5 S. D. R. 428; 81 S. B. 196.

Compare same title under "Non-incidental Work, Etc.," below. For general outline of the subject, with Key to leading cases, see 162 S. B. 21–28. See also 204 S. B. 78–88; 188 S. B. 46–57; 177 S. B. 68–85.

Companion to employer, employee traveling as: Hadsell v. Mallett, 229 App. Div. 817; 177 S. B. 101.

Consequential accidents: See above, page 33.

Cranking car preparatory to starting day's work. Traveling salesman injured while cranking own automobile in his garage preparatory to starting day's work: Madelung v. Dale Radio Co., Inc., 262 App. Div. 784.

Debt, collecting from co-employee: Thompson v. N. Y. Herald Co., 184 App. Div. 919; 97 S. B. 112.

Deviation: Domestic on errand for employee injured while walking back, having passed his station due to reading newspaper: Odon v. Lamborn, 234 App. Div. 788. See also, Oram v. Moon Co., Inc., 260 App. Div. 822; 285 N. Y. 42; Willis v. Tower, 261 App. Div. 859.

Dinner given by employer: Dancing at dinner given by employer: Kenney v. Lord & Taylor, 254 N. Y. Rep. 532; 177 S. B. 99; returning from dinner and demonstration provided by employer: Sinclair v. Wallach Laundry, Inc., 250 App. Div. 715; 204 S. B. 146; Bannar v. Root, Neal & Co., 257 App. Div. 879; 204 S. B. 143; also injury to traveling salesman driving home from dinner given by subordinates: Graves v. Tide Water Sales Co., 275 N. Y. Rep. 583; 204 S. B. 138. See also "Traveling outside employer's plant," below page 48.

Dog, kept on employer's premises, bite of: Baroney v. Brambach Piano Co., 101 Misc. 670; 87 S. B. 263; 97 S. B. 134; Monaco v. Kesselman's Baby Stores, 240 App. Div. 930; 12 Ind. Bul. 305.

Drink of water or other potable, procuring (see also "Coffee, going out for," above): Foster v. Steeplechase Amusement Co., 227 App. Div. 679; 177 S. B. 96; Minarick v. Rockland Finishing Co., 227 App. Div. 676; 177 S. B. 96; Kantor v. Armstrong Publishing Co., 236 App. Div. 749; 177 S. B. 73, 74, 96; Trace v. Hudson Rubber Tire Co., 208 App. Div. 826; 133 S. B. 65; Van Buren v. Vener Trucking Corp., 258 App. Div. 1016; 204 S. B. 129.

Drinking water, injury by: Schwartz v. McCleary, Wallin & Crouse, 118 S. B. 24; compare Scheerens v. Edwards & Son, 133 Misc. 616; 161 S. B. 16.

Dumb waiter or laundry chute, traveling by: Moscon v. Thomford, 260 N. Y. Rep. 578; 11 Ind. Bul. 438; Fissler v. Shirton's Laundry Co., 33 S. D. R 556; 227 App. Div. 833; 177 S. B. 85.

Errands: See "Casual tasks out of hours" and "Coming to or leaving work," above; also "Traveling outside employer's plant," below. Employees on way to perform both business and personal errands: Harvey v. Evans, 257 App. Div. 881; 204 S. B. 90; Levy v. Levy's Bazaar, Inc., 257 App. Div. 885; 204 S. B. 89; Mosher v. Cashmere Grotto, 257 App. Div. 886; 204 S. B. 90; Oram v. Moon Co., Inc., 260 App. Div. 822; 285 N. Y. 42.

Cook who was instructed by her employer to stop at a drug store on her way to work and sustained injury before reaching the store: Kristianson v. Lehman, 261 App. Div. 1023.

Taxicab driver who left taxicab meter running and was injured in restaurant while performing errand for passenger who had invited him there: Weinberg v. Allegheny Cab Co., 257 App. Div. 1088; 204 S. B. 91.

Excitement: See title, "Shock, Fright, Excitement, Etc.," under "Accident" above, page 31.

Explosions (compare same title under "Non-incidental Work, Etc.," below): Roberts v. Newcomb & Co., 234 N. Y. Rep. 553; 118 S. B. 63; Laurino v. Donovan, 186 App. Div. 387; 226 N. Y. Rep. 700; 97 S. B. 127; Miles v. Gibbs & Hill, 250 N. Y. Rep. 590; 161 S. B. 40, 41; Derby v. International Salt Co., 233 App. Div. 15; 177 S. B. 91; Saint Onge v. Schiavi, 32 S. D. R. 359; 214

App. Div. 750; 140 S. B. 65; Weir v. Elliott-Fisher Co., 29 S. D. R. 239; 207 App. Div. 882; 118 S. B. 65; Malena v. Leff, 265 N. Y. Rep. 533; 188 S. B. 90; Heaney v. Carlin Constr. Co., 269 N. Y. 93; 298 U. S. 637; 299 U. S. 41; 204 S. B. 553; Dingfeldt v. Albee Godfrey Whale Creek Co., 272 N. Y. Rep. 623; 301 U. S. 687, 715; 204 S. B. 555; Kame v. Stony Brook Quarry, 255 App. Div. 742; 204 S. B. 93. See also "Revolver," etc., below.

Exposing self to extra hazard: Garage watchman who was found asphyxiated in taxicab with motor and radio running: Shapiro v. Mural Transportation Corp., 257 App. Div. 1088; 204 S. B. 92.

Laborer who entered sawmill looking for employer to get further instructions: Heath v. Richard, 253 App. Div. 849; 204 S. B. 94.

Laborer injured carrying dynamite cap found at work: Kame v. Stony Brook Quarry, 255 App. Div. 742; 204 S. B. 93.

Teacher examining guns at home for school play: Maynard v. Board of Education, 255 App. Div. 908; 204 S. B. 93.

Truck drivers employed by gasoline dealer who became asphyxiated following their unexplained entry into a gasoline tank: Dunn and Smith v. Hambleton Terminal Corp., 257 App. Div. 1095; 204 S. B. 92.

Extra-State accidents: The three cases of New York employees most subject to accidents occurring without the State's bounds are (1) employees near the state line who cross it on brief journeys for miscellaneous errands or work of more or less temporary nature, (2) traveling employees, notably salesmen, who sometimes go to the ends of the earth, and (3) employees of resident New York contractors constructing buildings, highways, etc., in other States, near or far.

As to the first class, early in the history of the New York Workmen's Compensation Law, the Court of Appeals, the highest court of the State, affirmed awards to five employees residing in New York City and hurt in the near-by bordering States of New Jersey, Connecticut and Pennsylvania, i. e., metal-workers, Post v. Burger & Gohlke, 216 N. Y. 544; 81 S. B. 244; and Klein v. Stoller & Cook Co., 220 N. Y. Rep. 670; 87 S. B. 283; an electrician's helper, Fitzpatrick v. Blackall & Baldwin Co., 220 N. Y. Rep. 671; 87 S. B. 283; an installer of machinery: Spratt v. Sweeney & Gray Co., 216 N. Y. Rep. 763; 81 S. B. 244; and a truckman procuring fats for a New York candle factory: Valentine v. Smith, Angevine & Co., 216 N. Y. Rep. 763; 81 S. B. 244. It also affirmed award to a factory employee hurt in the Connecticut part of Port Chester, a village community divided on Long Island Sound by the New York state line: Beaudet v. Mertz Sons, — N. Y. Rep. ——, May 28, 1918. The general argument for extra-State coverage is set forth in the opinions of the Post case; against it, in the exhaustive employer's brief in the Klein case. In line with these older cases, the Court of Appeals, in 1932, with opinion, affirmed award to an employee hurt while erecting aerovanes in Pennsylvania: Smith v. Aerovane Utilities Corp., 259 N. Y. 126; 177 S. B. 215; and, in 1933, without opinion, reversed denial of award to the mother of an electrical construction employee killed by a live wire in Connecticut: Leary v. Daley & Co., 261 N. Y. Rep. 552; 188 S. B. 124.

Jurisdiction of the New York State Department of Labor was upheld in the case of a mason employed in New Jersey by a corporation of that State who was fatally injured on a New York job where he had been assigned four months earlier: Grasso v. Donaldson-Reynolds, Inc., 254 App. Div. 913; 279 N. Y. Rep. 584; 204 S. B. 99.

As to the second class, in 1921, the Court of Appeals affirmed award to the mother of a salesman, a resident of Iowa killed while traveling in Missouri: Hospers v. Hungerford-Smith Co., 230 N. Y. Rep. 616; 106 S. B. 251; in 1927, to the widow and son of a salesman who died as a result of an accident in Colorado, his home State: Ayers v. Dunn Pen and Pencil Co., 244 N. Y. Rep. 557; 149 S. B. 104; in 1930, to a radio singer hurt while broadcasting in Missouri: Hughes v. Waterson, Berlin & Snyder Co., 254 N. Y. Rep. 607; 177 S. B. 218; in 1932, to widow and stepdaughter of an airplane pilot killed by a crash in Connecticut: Tallman v. Colonial Air Transport, 259 N. Y. Rep. 512; 177 S. B. 219, and in 1934, to the widow of a salesman fatally hurt while traveling in Illinois: Straus v. Goldstein & Bros., 264 N. Y. Rep. 498; 185 S. B. 256. Hospers,

Ayers, and Straus were selling goods of New York factories; Hughes was popularizing songs of a New York music house; Tallman, a resident of New Jersey, was flying for a Connecticut corporation having its principal place of business in New York. The court reasserted its decisions in the two salesmen cases in its opinion in Cameron v. Ellis Construction Co., 252 N. Y. 394; 177 S. B. 208; and disregarded the carrier's contention that the Cameron decision was controlling in the Hughes case.

Jurisdiction of the New York State Department of Labor was upheld in the case of a sales manager of southern territory who was directed from the employer's office in New York State and injured in Georgia: Flinn v. Remington Rand, 251 App. Div. 578; 277 N. Y. Rep. 641; 204 S. B. 100.

In the third class of cases, the construction cases, the Court of Appeals reversed awards to an employee hurt while excavating sand from a sand pit in Canada, the sand being intended by his employer, a Massachusetts corporation, for near-by highway construction in New York: Cameron v. Ellis Construction Co., 252 N. Y. 394; 177 S. B. 208; to the mother of a policeman killed while guarding a building which was under erection in Pennsylvania by contractors whose principal offices were in New York city: Copeland v. Foundation Co., 256 N. Y. Rep. 568; 177 S. B. 211, 215, 220; to the family of a painter resident in New York and fatally hurt in New Jersey: Amaxis v. Vassilaros, 258 N. Y. Rep. 544; 177 S. B. 211; to the widow of a test borer for foundations, etc., killed by dynamite in Tennessee: Zeltoski v. Osborne Drilling Corp., 239 App. Div. 235; 264 N. Y. Rep. 496; 188 S. B. 128; and affirmed denial of award to an employee hurt while installing an automatic sprinkler system: Degenfelder v. Vogel Co., 264 N. Y. Rep. 676; 188 S. B. 130. The ground for these five decisions appears to be that the employees were not on the go in connection with activities of their employers in New York but were confined in their employment to "fixed places" outside the State (Cameron v. Ellis Construction Co., Supra).

On authority of the Cameron opinion and decision, supra, the Appellate Division has reversed awards in Baum v. N. Y. Air Terminals, 230 App. Div. 531; 177 S. B. 213; Kalfatis v. Commercial Painting Co., 233 App. Div. 649; 177 S. B. 214; Arnink v. Caflish, 232 App. Div. 713; 10 Ind. Bull. 126; Gullifer v. Hansen's Laboratory, 232 App. Div. 713; 10 Ind. Bul. 127; and Dullum v. Morgan, 236 App. Div. 874; 188 S. B. 131. In the same period the courts have affirmed extra-state accident awards to a silo erector, Campbell v. Craine, 263 N. Y. Rep. 579; 188 S. B. 125; to electric linemen, Leary v. Daley & Co., 261 N. Y. Rep. 552; 188 S. B. 124; Ralston v. N. Y. State E. & G. Corp., 236 App. Div. 766; 11 Ind. Bul. 389; to the special funds on account of a machine servicer and repairer, Peiffer v. Underwood Elliott Fisher Co., 271 N. Y. Rep. 639; 188 S. B. 125; to a tugboat master, Seely v. Phoenix Transit Co., 241 App. Div. 183; 188 S. B. 126; to a pile driver, Leize v. Horton Construction Co., 240 App. Div. 931; 12 Ind. Bul. 305; to a produce solicitor, Smith v. Danziger Bros. & Rubin, 240 App. Div. 930; 12 Ind. Bul. 307; to a branch sales manager, Flinn v. Remington Rand, 251 App. Div. 578; 277 N. Y. Rep. 641; 204 S. B. 100; to a salesman of proprietary medicines, Wagoner v. Brown Mfg. Co., 274 N. Y. Rep. 593; 204 S. B. 102; to a camp clerk, Chensky v. Beacon Commissary Corp., 236 App. Div. 865; 243 App. Div. 661; 188 S. B. 127; to a tile layer, DeFabbio v. Schenectady Tile Co. 236 App. Div. 868; 11 Ind. Bul. 441; to a farm laborer, Karminski v. Handwerg, 236 App. Div. 869; 11 Ind. Bul. 443; and to an erecting engineer, McDonald v. Worthington Pump & Machinery Corp., 232 App. Div. 862; 10 Ind. Bul. 197.

An engineer was employed in New York State by a New York corporation to convoy a locomotive from Buffalo to West Virginia and to act as engineer of the locomotive after its arrival there. While convoying said locomotive through Pennsylvania he sustained injuries for which the Industrial Board awarded compensation to him. Upon appeal, the employer contended that the Board was without jurisdiction to make the award since the employment was located outside the State of New York. Award was affirmed with statement that since part of claimant's employment was to prepare the locomotive in Buffalo, and another part was transitory in nature, the fact that the remaining portion was to be performed at a fixed point in West Virginia was immaterial. Noel v. Morrison & Co., Inc., 260 App. Div. 377.

The Court of Appeals reversed award to the widow and children of an engineer resident of New York killed while installing a boiler in Maine, his employer having removed its headquarters from New York before the accident: Smith v. Heine Safety Boiler Co., 242 N. Y. 9; 97 S. B. 214.

The New York State Department of Labor was held not to have jurisdiction in the following cases: A carpenter hired in New York by a New York corporation for work on a construction job in the Virgin Islands and injured there: Jensen v. Boudin Contracting Corp., 258 App. Div. 1009; 283 N. Y. Rep. 572; 204 S. B. 96; an electrician, resident of Chicago, hired to fix a sign there by the local branch manager of a firm whose factory and principal office were in New York and injured in course of the work: Bagdalik v. Flexlume Corp., 257 App. Div. 583; 281 N. Y. Rep. 858; 204 S. B. 97; and a counsellor hired in New York for work in camp located in Pennsylvania and injured there: Stern v. Camp Blue Ridge, 258 App. Div. 833; 283 N. Y. Rep. 675; 204 S. B. 95.

Jurisdiction of the New York State Department of Labor was upheld in the case of a deckhand in the employ of a New Jersey corporation operating ferries between New York and New Jersey who was fatally injured while doing carpentry work on the employer's dock in New Jersey. Decedent had been hired in New Jersey and the principal offices of the employer were in New York City. Gilmartin v. Electric Ferries, Inc., 258 App. Div. 829; 204 S. B. 103.

Accidents in places ceded to the United States, such as Governor's Island, present a double question of extra-territoriality and federal exclusion: Murray v. Gerrick & Co., 291 U. S. 315; 188 S. B. 161; Hand v. Apartment Engineering & Construction Co., 246 App. Div. 874; 188 S. B. 165; Walsh v. Apartment Engineering & Construction Co., 240 App. Div. 919, 188 S. B. 163; Alexander v. Movietonews, Inc., 273 N. Y. Rep. 511, 599; 301 U. S. 702; 204 S. B. 566; Seerman v. Lustig & Weil, Inc., 252 App. Div. 906; 204 S. B. 565. An Act of Congress, June 25, 1936, makes New York Workmen's Compensation Law applicable in all United States government places within the State's boundaries; text of it is in 188 S. B. 159.

An employee of a New York employer having incurred injury and received compensation in another state, may have compensation in New York less payments in the other State: Jenkins v. Hogan & Sons, 9 S. D. R. 380; 177 App. Div. 36; 87 S. B. 286; Gilbert v. Des Lauriers Column Mould Co., 180 App. Div. 59; 87 S. B. 289; Beaudet v. Mertz Sons, 181 App. Div. 963; 87 S. B. 289; affirmed by Court of Appeals, May 28, 1918; Di Noto v. Engel & Hevernor, 187 App. Div. 965; 97 S. B. 220. Compare Greese v. Baxter Wrecking Co., 21 S. D. R. 529.

Equity will impress a carrier's lien upon damages recovered from a third party in New York for compensation paid in New Jersey: Hartford Accident & Indemnity Co. v. Chartrand, 239 N. Y. 36; 133 S. B. 212. A carrier under the Connecticut compensation law is not liable for contribution with a carrier under the New York compensation law when the injured employee may claim in either State: Exchange Mutual Indemnity Ins. Co. v. Zurich General A. F. & L. Ins. Co., 122 Misc. 386; 133 S. B. 203. The Court of Appeals upheld award of $1,000 to the special funds though the fatally injured employee's widow and children had recovered compensation and damages in New Jersey: Peiffer v. Underwood Elliott Fisher Co., 243 App. Div. 658, 835; 245 App. Div. 347; 185 S. B. 101; 247 App. Div. 658; 271 N. Y. Rep. 639; 15 Ind. Bul. 226; 188 S. B. 125. The Supreme Court, New York County, dismissed a carrier's action to recover from a third party $1,000 paid into the special funds, the accident having occurred in New Jersey: Travelers Ins. Co. v. Central R. R. Co. of New Jersey, 143 Misc. 589; 177 S. B. 227.

Excepting admiralty and interstate commerce accidents, all accidents to employees occurring in New York appear to be within the workmen's compensation jurisdiction of the State though the employers belong to other States and carry on no activities in New York except those of the injured employees. But if such an employee, generally employed in another State, is employed in New York only temporarily, the New York courts will require him or his beneficiaries to seek compensation in his own State: Proper v. Polley Bros., 259 N. Y. Rep. 516; 177 S. B. 222; Whitmire v. Blaw-Knox Construction Co., 263 N. Y. Rep. 675; 188 S. B. 132; Eurbin v. Prudential Insurance Co., 275 N. Y. Rep. 577; 204 S. B. 101;

but compare McMahon v. Gretzula, 267 N. Y. Rep. 573; 188 S. B. 132; and Werner v. Le Veque Co., 242 App. Div. 719; 13 Ind. Bul. 204.

Federal constitution aspects of this situation are suggested by Quong Ham Wah v. Industrial Accident Comn., 184 Cal. 26, 40, 46; 177 S. B. 205, 206. See also Alaska Packers Assn. v. Industrial Accident Comn., 294 U. S. 532; 188 S. B. 114; and State of Ohio v. Chattanooga Boiler & Tank Co., 289 U. S. 439; 188 S. B. 121. If an employee receives compensation first from another State, the New York courts will not sustain an award by New York authorities: Minto v. Hitchings & Co., 204 App. Div. 661; 118 S. B. 182; and if an employee of an employer insured under the New Jersey compensation law crosses into New York and receives injury, the New York courts will recognize the New Jersey compensation law to the exclusion of an action for negligence: Barnhardt v. American Concrete Steel Co., 227 N. Y. 531; 106 S. B. 253. The New York compensation law covers retail stores maintained in New York by manufacturers of other states: Kohlhaus v. Regal Shoe Co., 183 App. Div. 911, 912; 97 S. B. 225; McDowell v. New Film Corp., 3 Bul. 10; 183 App. Div. 910; 97 S. B. 225; Capland v. Belber Trunk & Bag Co., 18 S. D. R. 563; 4 Bul. 54; 97 S. B. 225. See 162 S. B. 88, 89; 177 S. B. 194–228; 188 S. B. 114–132; 204 S. B. 95–106.

A general review of this subject appears in 177 S. B. 194–228, including text of the United States Supreme Court's opinion and decision in Bradford Electric Light Co. v. Clapper, 286 U. S. 145; 177 S. B. 199–205

For extra-state provisions of the various state compensation laws, see Bulletins of the United States Bureau of Labor Statistics, Nos. 272, 496, etc.

Fall caused by disease, negligence, sleepiness, vertigo, etc., injury by. See above, page 30.

Fire (see also "Explosions"; "Smoking"): Giliotti v. Hoffman Catering Co., 246 N. Y. 279; 156 S. B. 49; Ziolkowski v. American Radiator Co., 247 N. Y. 513; 156 S. B. 80; Marino v. Bormann, 248 N. Y. Rep. 512; 156 S. B. 66; Rzepczynski v. Manhattan Brass Co., 12 S. D. R. 540, 2 Bul. 91; 179 App. Div. 952; 87 S. B. 153; Malandrino v. Southern N. Y. P. & R. R. Corp., 20 S. D. R. 438; 190 App. Div. 780; 106 S. B. 110, 266; Frear v. Ells, 26 S. D. R. 713; 200 App. Div. 239; 118 S. B. 122; Bandassi v. Molla & Arigoni, 200 App. Div. 266; 234 N. Y. Rep. 554; 118 S. B. 121; see 162 S. B. 48; also Jones, Hannon and Rhodes cases, 8 Ind. Bul. 452, 739; Johnson v. Ulysses Apartments, 232 App. Div. 393; 177 S. B. 147; Stilson v. Littlewood, 244 App. Div. 858; 14 Ind. Bul. 176; Finnegan and Chambers v. Biehn, 276 N. Y. 50; reversing 250 App. Div. 791; 204 S. B. 114; Birch v. Budd, 256 App. Div. 53; 204 S. B. 107; Howell v. Craig Colony, 255 App. Div. 908; 204 S. B. 110.

Building a fire for warmth figured in Strand v. Harris Structural Steel Co., 260 App. Div. 516.

Excitement and exertion caused by fires figured in Andrews v. Emporium Forestry Co., 224 App. Div. 327; 250 N. Y. Rep. 592; 161 S. B. 31; Thompson v. City of Binghamton, 218 App. Div. 451; 149 S. B. 14.

See 162 S. B. 48; 177 S. B. 16, 17, 120, 147; 188 S. B. 60; 204 S. B. 107–111. Compare same title under "Non-incidental Work, Etc.," below.

Firearms: See "Revolver or similar weapon," below.

Food provided by employer, injury by: Fitzpatrick v. Postal Restaurant Co., 30 S. D. R. 324; 208 App. Div. 822; 133 S. B. 30; Eison v. Morhen Inn, 150 Misc. 540; 188 S. B. 91; see also "Digestive tract, infection or poisoning through," above, page 28.

Fright. See title, "Shock, Fright, Excitement, Etc.," above, page 31.

Frostbite due to special hazard: Cleveland v. Rice, 209 App. Div. 257; affd., 239 N. Y. Rep. 530; 133 S. B. 87; Phonville v. N. Y. & Cuba S. S. Co., 226 N. Y. Rep. 618, 622; 97 S. B. 27; Quick v. Ilston Ice Co., 195 App. Div. 676, 106 S. B. 28; Days v. Trimmer & Sons, 176 App. Div. 124; 87 S. B. 48; Callow v. Feinberg, 232 App. Div. 860; 177 S. B. 121; Wiley v. Arbuckle Bros., 245 App. Div. 885; 204 S. B. 62; but compare Dunn v. Unit System Laundry, 248 App. Div. 659; 204 S. B. 62. See also 162 S. B. 8.

Gloves for work, retrieving: Butlak v. Bethlehem Steel Co., 5 Ind. Bul. 167; 216 App. Div. 777; 149 S. B. 58.

Golf playing: Golf caddy who sustained injury while playing in a practice game with other caddies, such games being encouraged by the club: Piusinski v. Transit Valley Country Club, 259 App. Div. 765; 283 N. Y. Rep. 674; 204 S. B. 124.

Goodwill, obtaining for employer: Gross v. Davey Tree Expert Co., 272 N. Y. Rep. 657; 204 S. B. 88; Murphy v. N. Y. Butchers Dressed Meat Co., 249 App. Div. 888; 204 S. B. 89; but see Dawe v. United Marine Contracting Corp., 250 App. Div. 805; 204 S. B. 88.

Guest of employer, servant accommodating: Monk v. Morris, 228 App. Div. 741; 177 S. B. 101; Towbin v. Napanoch Country Club, 235 App. Div. 753; 11 Ind. Bul. 237.

Heat prostration due to special hazard (compare "Heat prostration" under "Non-incidental Work, Etc.," below): Hughes v. Saint Patrick's Cathedral, 245 N. Y. 201; 156 S. B. 19; Murray v. Cummings Construction Co., 133 S. B. 29; 106 S. B. 25; Hernon v. Holihan, 182 App. Div. 126; 87 S. B. 46; Mona v. Union Ry. Co., 227 App. Div. 678; 177 S. B. 121; Buchholtz v. American Terminal Warehouse Corp., 261 App. Div. 859. See also 162 S. B. 48 and 204 S. B. 63.

Hiring men and procuring supplies: Lanigan v. Town of Saugerties, 14 S. D. R. 623; 180 App. Div. 227; 223 N. Y. Rep. 685; 87 S. B. 162.

Hockey playing on team sponsored by employer: Chadwick v. N. Y. Stock Exchange, 252 App. Div. 233; 204 S. B. 125.

Home of employer or other superior, detail to work at: Jaabeck v. Crane's Sons Co., 238 N. Y. 314; 133 S. B. 196; MacDonald v. Grand Battery & Ignition Service, 254 N. Y. Rep. 605; 177 S. B. 92; Collier v. Dangard, 256 N. Y. Rep. 561; 177 S. B. 93; Pizcz v. Schultz, 236 App. Div. 552; 185 S. B. 439. See § 54, Subd. 4, below, and cases thereunder; also, 162 S. B. 154.

Horseplay (compare same title under "Non-incidental Work, Etc.," below): Leonbruno v. Champlain Silk Mills, 229 N. Y. 470; 106 S. B. 137; Verschleiser v. Stern & Sons, 229 N. Y. 192; 106 S. B. 121; Miles v. Gibbs & Hill, 250 N. Y. Rep. 590; 161 S. B. 41; Markell v. Green Felt Shoe Co., 221 N. Y. Rep. 493; 87 S. B. 147; Banaski v. American Car & Foundry Co., 211 App. Div. 820; 133 S. B. 78; Van Bencoten v. Village of Horseheads, 231 App. Div. 773; 177 S. B. 118; Wakefield v. World-Telegram, 274 N. Y. Rep. 517; 204 S. B. 72; Mason v. Nassau Riding Academy, 250 App. Div. 802; 204 S. B. 111; Donovan v. Bush Terminal Co., 255 App. Div. 737; 204 S. B. 111. See also 162 S. B. 45.

Idle time, visiting co-worker during: Mirachi v. Revere Copper & Brass, Inc., 255 App. Div. 735; 204 S. B. 148. See also "Sleeping, resting or waiting," below.

Inspecting machinery: Benton v. Fraser, 5 S. D. R. 392; 172 App. Div. 913; 219 N. Y. 210; 81 S. B. 193.

Ivy, poison: See "Poison ivy," below.

Leaving work: See "Coming to or leaving work," above.

Lightning stroke due to special hazard (compare "Lightning" under "Non-incidental Work, Etc.," below). Madura v. Bronx Parkway Comn., 206 App. Div. 598; 238 N. Y. 214; 133 S. B. 88, 89; Rung v. Bronx Parkway Comn., 29 S. D. R. 478; 207 App. Div. 879; 238 N. Y. Rep. 556; 133 S. B. 88, 90; Many v. Bradford, 266 N. Y. Rep. 558; 188 S. B. 90; Emmick v. Hanrahan Brick & Ice Co., 29 S. D. R. 541; 206 App. Div. 580; 133 S. B. 91; Mesquita v. Briarcliff Realty Co., 30 S. D. R. 79; 208 App. Div. 753; 133 S. B. 88; Brandecker v. Whitestone Weaving Co., 36 S. D. R. 642; 221 App. Div. 813; 156 S. B. 68; State Treasurer ex rel. Ostepek v. Issecks & Son, 32 S. D. R. 603; 149 S. B. 59; Cummings v. Bruce & Drake, 231 App. Div. 775; 177 S. B. 132.

Living on employment premises (compare same title under "Non-incidental Work, Etc.," below, and "Janitors" under Group 12 of Subd. 1 of § 3, below): Giliotti v. Hoffman Catering Co., 246 N. Y. 279; 156 S. B. 49; Andrews v. Emporium Forestry Co., 224 App. Div. 327; 250 N. Y. Rep. 592; 161 S. B. 31; Hanna v. Pierson Co., 194 App. Div. 944; 106 S. B. 152; Underhill v. Keener, 233 App. Div. 779; 177 S. B. 87; Shapiro v. Employers' Liability Assurance Corp., 139 Misc. 454; 177 S. B. 87; Appert v. Kings Park State Hospital, 240 App. Div. 795; 188 S. B. 63; Finnegan and Chambers v. Biehn, 276 N. Y. 50, reversing 250 App. Div. 791; 204 S. B. 114; Nagengast v. Spatz, 257 App. Div. 1096; 284

N. Y. Rep. 573; 204 S. B. 112; Dienske v. Tompkins, 255 App. Div. 735; 280 N. Y. Rep. 524; 204 S. B. 113; Mowen v. Chase National Bank, 252 App. Div. 801; 277 N. Y. 135; 204 S. B. 113; Coulter v. Nassau-Suffolk B. & M. Corp., 259 App. Div. 942; 204 S. B. 116; Kruczek v. Rumfola Bros., 256 App. Div. 866; 204 S. B. 117; Birch v. Budd. 256 App. Div. 53; 204 S. B. 107; Montgomery v. Backer, 248 App. Div. 842; 204 S. B. 119; Boyd v. Young Women's Christian Assn., 248 App. Div. 646; 204 S. B. 119; White v. Williamson, 246 App. Div. 874; 204 S. B. 120; Quigley v. Bonray Hotel Co., Inc., 245 App. Div. 886; 204 S. B. 120.

See also 162 S. B. 29; 177 S. B. 86–90; 188 S. B. 60–63; 204 S. B. 112–120.

Loitering on employment premises: Printer injured in employer's shower room after quitting time, having first visited outside restaurant before washing up: Marco v. News Syndicate Co., 257 App. Div. 887; 204 S. B. 121; employee injured in employer's dressing room after quitting time, having tarried there conversing with former co-employee: O'Grady v. Fidelio Brewery, Inc., 257 App. Div. 880; 204 S. B. 121.

Lumber camp, serving as errand boy for: Posey v. Moynehan, 195 App. Div. 440; 106 S. B. 85.

Lunch and lunch interval (compare "Lunch" under "Non-incidental Work, Etc.," below): Domres v. Syracuse Safe Co., 240 N. Y. Rep. 611; 140 S. B. 44, 45; Tannenbaum v. Perfect Tailoring Co., 243 N. Y. Rep. 577; 149 S. B. 49; Crippen v. Press Co., 228 App. Div. 727; 254 N. Y. Rep. 535; 177 S. B. 84; Schwimmer v. Kammerman & Kaminsky, 262 N. Y. 104; 188 S. B. 54; Brown v. Oceanic Service Corp., ex rel., 275 N. Y. Rep. 562; 204 S. B. 123; Sztorc v. Stansbury, 189 App. Div. 388; 97 S. B. 105; Donlon v. Kips Bay Brewing & Malting Co., 189 App. Div. 415; 97 S. B. 103; Etherton v. Johnson Knitting Mills Co., 184 App. Div. 820; 97 S. B. 104; Lavancha v. Kimball & Son, 17 S. D. R. 623; 187 App. Div. 962; 97 S. B. 105; Borst v. Mutual Life Ins. Co., 218 App. Div. 793, 156 S. B. 48; Gabriele v. Dubilier Condenser Corp., 233 App. Div. 784; 10 Ind. Bul. 267; Lehrbaum v. United Cigar Stores Co., 238 App. Div. 751; 12 Ind. Bul. 50; Sheehan v. Board of Trustees, Village of Schuylerville, 256 App. Div. 148; 281 N. Y. Rep. 613; 204 S. B. 78; 260 App. Div. 825; Smith v. City of New York, 261 App. Div. 860; 285 N. Y. Rep. —; Laubeck v. Toc's Products Co., 260 App. Div. 966; 286 N. Y. Rep. —; Oram v. Moon Co., Inc., 260 App. Div. 822; 285 N. Y. 42; Bollard v. Engel, 254 App. Div. 162; 278 N. Y. 463; 204 S. B. 135; Muzerkevitch v. Zaitz, Berzman & Suskowitz, 257 App. Div. 882; 204 S. B. 124; Garvin v. Cleveland & Ryan, Inc., 255 App. Div. 730; 204 S. B. 124. Compare Baum v. Schweitzer, 124 Misc. 516. See 162 S. B. 28; 177 S. B. 85, 86; 188 S. B. 182; 204 S. B. 121–124.

Lunch box, recovering: Schibiiske v. City of Kingston, 30 S. D. R. 77; 207 App. Div. 882; 133 S. B. 60.

Machine, taking fibre from: Bestwall v. Chelsea Fibre Mills, 19 S. D. R. 448, 188 App. Div. 946; 106 S. B. 172.

Machinery, installing or repairing: McNally v. Diamond Mills Paper Co. 223 N. Y. 83; 87 S. B. 103; Pfeiffer & Fish v. Schweitzer Co., 246 N. Y. Rep. 545; 156 S. B. 237; Smith v. Washburn & Co., 224 N. Y. Rep. 619; 97 S. B. 135.

Mail, posting or procuring: Woolley v. Geneva Cutlery Co., 181 App. Div. 909; 15 S. D. R. 637, 3 Bul. 156; 87 S. B. 149; Swanick v. Saratoga Milling & Grain Co., 181 App. Div. 911; 87 S. B. 149; but compare Gomph v. Empire Floor & Lumber Corp., 223 App. Div. 803; 161 S. B. 37.

Money or other property, carrying, collecting, etc.: McConvey v. Donovan Haas Co., 253 N. Y. Rep. 538; 9 Ind. Bul. 170; Clifford v. Marine Trust Co., 249 N. Y. Rep. 526; 161 S. B. 40; Wilber v. Fonda, J. & G. R. R. Co., 208 App. Div. 249; 133 S. B. 58; Mason v. Scheffer, 203 App. Div. 332; 118 S. B. 66; Spang v. Broadway B. & M. Co., 182 App. Div. 443; 87 S. B. 111; but compare Carroli v. Verway Printing Co., 254 N. Y. Rep. 598; 177 S. B. 103; Torres v. Criterion Concessions, Inc., 259 App. Div. 770; 284 N. Y. Rep. 615; 204 S. B. 85. See also 162 S. B. 38; 177 S. B. 103, 104.

Motorcycle, using in employer's service: Pizcz v. Schuitz, 236 App. Div. 552; 11 Ind. Bul. 439; Towbin v. Napanoch Country Club, 235 App. Div. 753; 11 Ind. Bul. 237.

Newspaper, procuring for superior: Glicksman v. N. Y. Rapid Transit Corp., 259 N. Y. Rep. 511; 177 S. B. 98.

Picnic, dinner or other gathering, attending: Kenney v. Lord & Taylor, 254 N. Y. Rep. 532; 177 S. B. 99; Selonick v. Joe Lowe Corp., 227 App. Div. 678; 177 S. B. 107; Ade v. Rochester G. & E. Co., 118 S. B. 126; Fagan v. Albany Evening Union Co., 261 App. Div. 861; but compare Melanson v. Morton & Son, 35 S. D. R. 719; 33 S. D. R. 593; 149 S. B. 59.

Playing athletic games sponsored by employer: (see also "Ball playing"): Piusinski v. Transit Valley Country Club, 259 App. Div. 765; 283 N. Y. Rep. 674; 204 S. B. 124; Huber v. Eagle Stationery Corp., 254 App. Div. 788; 204 S. B. 125; Chadwick v. N. Y. Stock Exchange, 252 App. Div. 714; 204 S. B. 125; Holst v. N. Y. Stock Exchange, 252 App. Div. 233; 204 S. B. 126.

Poison ivy, contact with: Plass v. Central New England Ry. Co., 169 App. Div. 826; 226 N. Y. 449; 81 S. B. 205; 97 S. B. 234; Schwartzott v. Erie County Highway Dept., 243 App. Div. 662; 14 Ind. Bul. 30; Sharon v. Town of Boonville, 32 S. D. R. 545.

Poison taken by mistake: Roos v. Loft, Inc., 247 App. Div. 842; 204 S. B. 128; but compare same title under "Non-incidental Work, Etc.," below.

Police, aiding: Babington v. Yellow Taxi Corp., 250 N. Y. 14; 161 S. B. 41; injury by, Heidemann v. American District Telegraph Co., 230 N. Y. 305; 106 S. B. 140; Greenberg v. Voit, 250 N. Y. Rep. 543; 161 S. B. 40; compare Sabatelli v. De Robertis, 192 App. Div. 873; 230 N. Y. Rep. 592; 106 S. B. 142.

Procuring coffee or other drink (see also "Coffee, going out for," above): Martino v. Blue Ridge Coal Co., 248 App. Div. 660; 204 S. B. 129; Van Buren v. Vener Trucking Corp., 258 App. Div. 1016; 204 S. B. 129.

Proffering aid: Smith v. Estate of Coykendall, 251 App. Div. 757; 277 N. Y. Rep. 537; 204 S. B. 129; Van Buren v. Vener Trucking Corp., 258 App. Div. 1016; 204 S. B. 129; Fineman v. Albany Evening Union Co., 254 App. Div. 794; 204 S. B. 130; Gross v. Davey Tree Expert Co., 248 App. Div. 838; 272 N. Y. Rep. 657; 204 S. B. 88.

Pump of employer, investigating: Ellis v. Dugan & Co., 219 App. Div. 850; 156 S. B. 68.

Pursuing intruders, etc., beyond employment premises: Pendl v. Haenel, 229 App. Div. 52; 254 N. Y. Rep. 606; 234 App. Div. 643; 177 S. B. 102; Ruppert v. Plattdeutsche Volksfest Verein, 263 N. Y. 338; 188 S. B. 68; O'Brien v. Shore Road Hospital, 275 N. Y. Rep. 570; 204 S. B. 78; Rasmusser v. Diplomat Bar & Grill, Inc., 260 App. Div. 965.

Railroad, traveling upon: Schmauss v. Dutch & Co., 17 S. D. R. 569, 3 Bul. 218.

Recreation to relieve strain of work: Clapham v. David, 232 App. Div. 458; 177 S. B. 105; also leaving boat while on continuous duty to get food and recreation: Smith v. Estate of Coykendall, 251 App. Div. 757; 277 N. Y. Rep. 537; 204 S. B. 129.

Reporting at job site during lay-off: Employee temporarily laid off who retained boat pass and payroll number and was drowned while enroute to the island where the job was located to apply for work in compliance with the foreman's advice: Buchignani v. Taylor Co., 256 App. Div. 1016; 281 N. Y. Rep. 707; 204 S. B. 8.

Rescue of another, going to (compare "Rescue" under "Non-incidental Work, Etc.," below): Waters v. Taylor Co., 218 N. Y. 248; 81 S. B. 218; Sassano v. Paino, 226 N. Y. Rep. 699; 97 S. B. 117; Martucci v. Hills Bros. Co., 171 App. Div. 370; 81 S. B. 220; Mariano v. Krasnoger Bros., 190 App. Div. 65; 228 N. Y. Rep. 609; 97 S. B. 118; Orr v. Cunard S. S. Co., 208 App. Div. 823; 133 S. B. 79; Brown v. Vosberg & Son, 217 App. Div. 706; 149 S. B. 61.

Resting. See "Sleeping, resting or waiting," below.

Revolver or similar weapon, unintentional wounding by (compare same title under "Non-incidental Work, Etc.," below): Brozovich v. Hotel Pennsylvania, 259 N. Y. Rep. 514; 177 S. B. 118, 119; Entrocut v. Paramount B. & R. Co., 222 App. Div. 844; 161 S. B. 45; Weitlauf v. 3rd Ave. Ry. Co., 214 App. Div. 845; 149 S. B. 58; Holzer v. Gobel, 27 S. D. R. 310; 202 App. Div. 770; 118 S. B. 117; Wakefield v. World-Telegram, 274 N. Y. Rep. 517; 204 S. B. 72; Heimroth v. Elk Transportation Corp., Inc., 259 App. Div. 944; 204 S. B. 578; Bopp v. Eclipse B. & L. Co., 2 Bul. 65. See also 162 S. B. 46, 49.

Roof, object falling from other premises through the: Bandassi v. Molla & Arigoni, 200 App. Div. 266; 118 S. B. 121; Malena v. Leff, 265 N. Y. Rep. 533, 188 S. B. 90.

Salesmen: See "Extra-state accidents," above; "Traveling," below.

Shelf, building a: Larsen v. Paine Drug Co., 169 App. Div. 838; 218 N. Y. 252; 81 S. B. 189.

Shoe, fixing to relieve hurting: Elliott v. U. S. Gypsum Co., 27 S. D. R. 121; 202 App. Div. 766; 118 S. B. 101.

Sleeping, resting or waiting (compare same title under "Non-incidental Work, Etc.," below): Corrina v. De Barbieri, 247 N. Y. 357; 156 S. B. 69; Norris v. N. Y. Central R. R. Co., 246 N. Y. 307; 156 S. B. 81; Cleveland v. Rice, 209 App. Div. 257; 239 N. Y. Rep. 530; 133 S. B. 87; Moore v. Lehigh Valley R. R. Co., 169 App. Div. 177; 217 N. Y. Rep. 627; 81 S. B. 199; Smith v. Oesterheld & Son, 189 App. Div. 384; 229 N. Y. Rep. 525; 97 S. B. 109; Domres v. Syracuse Safe Co., 211 App. Div. 823; 240 N. Y. Rep. 611; 140 S. B. 57, 58; Roberts v. Aetna C. & S. Co., 253 N. Y. Rep. 540; 177 S. B. 90; Lanni v. Amsterdam Bldg. Co., 221 App. Div. 824; 217 App. Div. 278; 161 S. B. 149; 149 S. B. 56; McCloskey v. Hellmann, 196 App. Div. 674; 106 S. B. 112; Owen v. Dean, 35 S. D. R. 620; 218 App. Div. 805; 156 S. B. 73; Fuller v. Title Guarantee & Trust Co., 229 App. Div. 816; 223 App. Div. 173; 9 Ind. Bul. 238; 156 S. B. 65; Webb v. Du Pont Engineering Co., 224 App. Div. 680; 161 S. B. 46; Minarick v. Rockland Finishing Co., 227 App. Div. 676; 177 S. B. 91; Rhodes v. Hoffman Catering Co., 230 App. Div. 796; 177 S. B. 90; Derby v. International Salt Co., 233 App. Div. 15; 177 S. B. 91; Gilkes v. Laurelton Homes, 234 App. Div. 640; 11 Ind. Bul. 29; Casner v. Golding, 236 App. Div. 766; 11 Ind. Bul. 387; Zwilling v. Slotnik Co., 254 App. Div. 792; 204 S. B. 149. See also 162 S. B. 29, 30.

Slipping or tripping (see also, "Fall caused by disease, negligence, sleepiness, vertigo, etc.," above): Grieb v. Hammerle, 222 N. Y. 382; 87 S. B. 149; Redner v. Faber & Son, 223 N. Y. 379; 87 S. B. 157; Tannenbaum v. Perfect Tailoring Co., 243 N. Y. Rep. 577; 149 S. B. 49, 58; Hubbard v. Lehigh & H. R. Ry. Co., 245 N. Y. Rep. 544; 156 S. B. 127; Pasternack v. Federation of Jewish Charities, 240 N. Y. Rep. 621; 140 S. B. 64; and other references of 162 S. B. 52, 53.

Smoking (compare same title under "Non-incidental Work, Etc.," below): Johnson v. Ulysses Apartments, 232 App. Div. 393; 177 S. B. 147; Chludzinski v. Standard Oil Co., 176 App. Div. 87; 87 S. B. 163; Moroski v. Barnet & Son, 240 App. Div. 925; 12 Ind. Bul. 305; Bailey v. N. Y. Central R. R. Co., 26 S. D. R. 184; Patterson v. Scharlin Bros., 28 S. D. R. 51.

Soccer, playing on team sponsored by employer: Holst v. N. Y. Stock Exchange, 252 App. Div. 233; 204 S. B. 126.

Storm, injury by: Pierce v. Young, 252 N. Y. Rep. 520; 177 S. B. 132, 133; Tallis v. National Cash Register Co., 238 App. Div. 879; 188 S. B. 17; seeking shelter from, Moore v. Lehigh Valley R. R. Co., 169 App. Div. 177; 217 N. Y. Rep. 627; 81 S. B. 199; Dalin v. Burghard, ex rel., 262 App. Div. 783; compare "Lightning," above.

Street or other highway, traversing: See "Traveling" below.

Strikers, assault by (compare same title under "Non-incidental Work, Etc.," below): Crippen v. Press Co., 254 N. Y. Rep. 535; 177 S. B. 84. See also 162 S. B. 44; Romano v. Siff Bros., 4 Bul. 189; 20 S. D. R. 430; 97 S. B. 99, 100.

Supplies and tools, procuring or transporting: McCarthy v. Walsh Construction Co., 254 N. Y. Rep. 608; 185 S. B. 466; Polli v. Haskel & Sons, Inc., 255 App. Div. 738; 204 S. B. 144. See also 177 S. B. 110-112.

Telephoning home: Parisi v. City of Niagara Falls, 245 App. Div. 884; 204 S. B. 133; delivering telephone message as act of courtesy: Job v. Hislop & Marshall Estate, 21 S. D. R. 182, 5 Bul. 25; 192 App. Div. 937; 97 S. B. 139.

Thieves or other intruders, searching for or chasing: Pendl v. Haenel, 229 App. Div. 52; 177 S. B. 102; Van Tyne v. 42 East 11th St. Hotel Corp., 214 App. Div. 750; 140 S. B. 65; see also 162 S. B. 33.

Threshing for a mill: Vincent v. Taylor Bros., 180 App. Div. 818; 185 App. Div. 901; 87 S. B. 80; 97 S. B. 85.

Tobacco, procuring (compare same title under "Non-incidental Work, Etc.," below): Wickham v. Glenside Woolen Mills, 252 N. Y. 11; 177 S. B. 95,

96: Springer v. North, 205 App. Div. 734; 133 S. B. 83; see also "Smoking," above.

Torpedo, casually striking: Miles v. Gibbs & Hill, 250 N. Y. Rep. 590; 161 S. B. 41.

Training school, injury while attending: Tallis v. National Cash Register Co., 238 App. Div. 879; 188 S. B. 58.

Transportation to or from work: See Coming to or leaving work.

Traveling outside employer's plant—collectors, mechanics, messengers, salesmen, etc.: The Court of Appeals, with opinion, has affirmed awards to an employee crossing a street from one plant of his employer to another: Redner v. Faber & Son, 223 N. Y. 379; 97 S. B. 131; a salesman inspecting machinery installed in a customer's plant: Benton v. Fraser, 219 N. Y. 210; 81 S. B. 193; a cigar factory packer delivering cigars to a hotel: Grieb v. Hammerle, 222 N. Y. 382; 87 S. B. 149; a watchman going for his time clock keys: Bergman v. Buffalo Dry Dock Co., 269 N. Y. 150; 188 S. B. 66; and, without opinion, to a town highway foreman looking for supplies and laborers on Sunday: Lanigan v. Town of Saugerties, 180 App. Div. 227; 223 N. Y. Rep. 685; 87 S. B. 162; a store detective returning home from a court trial: Gibbs v. Macy & Co., 214 App. Div. 335; 242 N. Y. Rep. 551; 149 S. B. 45; 140 S. B. 47; a salesman setting out from home to solicit orders: Harby v. Marwell Bros., 203 App. Div. 525; 235 N. Y. Rep. 504; 118 S. B. 68; a printing solicitor injured by an explosion while traversing a street: Roberts v. Newcomb & Co., 234 N. Y. Rep. 553; 118 S. B. 63; a salesman walking from his home to a telephone: Ryan v. Cole, 266 N. Y. Rep. 561; 188 S. B. 77; a clothing factory assistant on his way from the factory to a tailor shop: Weinberg v. Eagle Clothes, 268 N. Y. Rep. 511; 188 S. B. 84; a salesman driving home from his employer's office with goods aboard: Theyken v. Diplomat Products, 268 N. Y. Rep. 544, 658; 188 S. B. 78; a salesman hurt while shaving on a train: Lief v. Walzer & Son, 272 N. Y. Rep. 542; 188 S. B. 76; salesmen paid by commission only: Bettinger v. Federal Concrete Co., 268 N. Y. Rep. 655; 188 S. B. 26; Jacobi v. Supreme Junior Coat Co., 268 N. Y. Rep. 654; 185 S. B. 228; to an outside estimator on way from home to inspect ship: Bennett v. Marine Works, 273 N. Y. 429; 204 S. B. 140; to a milk driver's helper driving truck for a time: Falk v. Midland Dairy, 242 App. Div. 668; 266 N. Y. Rep. 559; 248 App. Div. 929; 188 S. B. 70; 273 N. Y. Rep. 616; 16 Ind. Bul. 165.

Awards were affirmed to a painter who worked late upon request of his employer on promise that he would be taken home and who sustained injuries while crossing the street in front of his home, point to which he was driven: Sihler v. Lincoln-Alliance Bank & Trust Co., 255 App. Div. 415; 280 N. Y. 173; 204 S. B. 134; to a salesman obtaining credit information from a friend at whose home he was passing the night: Cowles v. U. S. Rubber Products, 254 App. Div. 123; 279 N. Y. Rep. 589; 204 S. B. 134; to a salesman returning to his employer's salesroom after obtaining quick supper in near-by restaurant: Bollard v. Engel, 254 App. Div. 162; 278 N. Y. 463; 204 S. B. 135; to a sales agent and collector driving home from dinner given in honor of a fellow-employee: Graves v. Tide Water Oil Sales Co., 249 App. Div. 911; 275 N. Y. Rep. 583; 204 S. B. 138; to a traveling auditor setting out from home who strained himself while cranking an automobile assigned to him by his employer: De Cicco v. Rubel Corp., 251 App. Div. 752; 275 N. Y. Rep. 576; 204 S. B. 139; to a salesman who at time of accident was enroute to procure license plates for his automobile and to call upon a prospective customer: Wagoner v. Brown Mfg. Co., 249 App. Div. 886; 274 N. Y. Rep. 593; 204 S. B. 102; to a salesman driving home from a business dinner: Bannar v. Root, Neal & Co., 257 App. Div. 879; 204 S. B. 143; to salesmen driving home from conference with superior, having stopped enroute for supper: Clarke v. Shell Union Oil Corp., 254 App. Div. 610; 204 S. B. 144; Natole v. Shell Union Oil Corp., 254 App. Div. 611; 204 S. B. 145; to a salesman driving home after a special demonstration in the employer's automobile showroom: Shepperson v. Mosher Bros., Inc., 253 App. Div. 852; 204 S. B. 145; to a stonecutter injured while returning employer's tools at end of the day: Polli v. Haskel & Sons, Inc., 255 App. Div. 738; 204 S. B. 144; to a store manager injured enroute to sales meeting called by employer: White v. Grand Union Co., 253 App. Div. 853; 204 S. B. 146; to a metal worker who was sent by his employer at its expense from its place of business in New York City

to Rye, New York, to work on a job and was struck by an automobile on his way back, within working hours: Exelbert v. Klein & Kavanagh, 246 App. Div. 873; 243 App. Div. 839; 204 S. B. 147; and to an office manager who was directed to attend a safety conference and at the end of the session was fatally injured while boarding a train on way to his home: Thornton v. Kings County Lighting Co., ex rel., 260 App. Div. 822.

See also "Coming to or leaving work," "Extra-state accidents," "Money of employer, carrying," "Pursuing intruders," above; note relative to "Operation of vehicles," § 3, subd. 1, group 7, below; 162 S. B. 37, 42; 177 S. B. 101–112, 304; 188 S. B. 69–79; 204 S. B. 133–148; Penn v. Lunitz & Sons, 235 App. Div. 884; 11 Ind. Bul. 273. Compare "Traveling" under "Non-incidental Work, Etc.," below.

Truck in motion, crawling across hood of: Emerick v. Dale's Motor Truck Service, 264 N. Y. Rep. 524; 188 S. B. 87; truck jumping from street onto work premises, struck by: Domres v. Syracuse Safe Co., 211 App. Div. 823; 240 N. Y. Rep. 611; 140 S. B. 57, 58.

Visiting sick co-employee, accident while: Nesofsky v. Ragorotsky, 274 N. Y. Rep. 596; 204 S. B. 148; visiting co-worker on employer's premises: Mirachi v. Revere Copper & Brass, Inc., 255 App. Div. 735; 204 S. B. 148.

Wages, collecting from employer (compare same title under "Non-incidental Work, Etc.," below): Younger v. Motor Cab Transportation Co., 260 N. Y. 396; 188 S. B. 63; Bacon v. Hudson Valley Fuel Corp., 248 App. Div. 653; 273 N. Y. Rep. 675; 16 Ind. Bul. 165; Morgan v. Bergin, 262 N. Y. Rep. 673; 188 S. B. 83; Lanni v. Amsterdam Building Co., 214 App. Div. 278; 149 S. B. 56.

Waiting in line for shovel: Maffi v. City of New York, 248 App. Div. 838; 204 S. B. 149; waiting on job site during rain storm: Zwilling v. Slotnik Co., 254 App. Div. 792; 204 S. B. 149. See also "Sleeping, resting or waiting," above.

Washing up: See "Bathing," "Living on employment premises," and "Loitering."

Watching premises (compare same title under "Non-incidental Work, Etc.," below): In Fogarty v. National Biscuit Co., 221 N. Y. 20; 87 S. B. 96, the Court of Appeals held that accidental injury to a watchman employed by an employer carrying on an employment covered by the Workmen's Compensation Law is compensable though the accident occurs while the plant is not in operation and though the watchman does nothing else for his employer but watch. The decision placed the compensation of watchmen upon the broad ground of incidentalness. It disregarded distinctions drawn by the Appellate Division. The Court of Appeals upheld an award against a company furnishing burglary alarm and watchman service for the accidental shooting of a watchman by a policeman in the open street in a burglar chase: Heidemann v. American District Telegraph Co., 193 App. Div. 402; 230 N. Y. 305; 106 S. B. 140; and award against the carrier of one of seventeen separate property owners for injury to a night watchman who made the rounds of seventeen premises: Moochler v. Herrick & Son, 272 N. Y. Rep. 545; 204 S. B. 265. The Appellate Division held that murder of a watchman for his wages was incidental to his employment: Lanni v. Amsterdam Building Co., 217 App. Div. 278; 149 S. B. 56. See Cassidy v. 143 West 49th St. Construction Corp., 256 N. Y. Rep. 576; 177 S. B. 140; Bergman v. Buffalo Dry Dock Co., 269 N. Y. 150; 188 S. B. 66; Shapiro v. Mural Transportation Corp., 257 App. Div. 1088; 204 S. B. 92; Heimroth v. Elk Transportation Corp., Inc., 259 App. Div. 944; 204 S. B. 578. Consult 162 S. B. 36, 37, 94, 101, 102, also indexes, 177 S. B. 305; 188 S. B. 185; 204 S. B. 606, title "Watchman".

Windows, janitress washing own: Hanna v. Pierson Co., 194 App. Div. 944; 106 S. B. 152; Poupart v. Myers, 242 App. Div. 720; 13 Ind. Bul. 203; removing shade preparatory to cleaning windows: Tracy v. Mertens, 12 S. D. R. 562, 2 Bul. 102; 87 S. B. 113; raising window shade: Dienske v. Tompkins, 255 App. Div. 735; 280 N. Y. Rep. 524; 204 S. B. 113.

Windstorm, injury by: Pierce v. Young, 252 N. Y. Rep. 520; 177 S. B. 132, 133; Dalin v. Burghard, ex rel., 262 App. Div. 783.

Non-Incidental Work, Occupations, Conditions and Occurrences

In the following cases the accidental injuries have been held not to be incidental and hence not to be compensable:

Adjoining premises, object falling from: McCarter v. La Rock, 240 N. Y. 282; 140 S. B. 59; revellers' stray bullet coming from: Lebeda v. Pongracz, 256 N. Y. Rep. 560; 177 S. B. 100; but compare same topic under "Incidental Work, Etc.," above.

Ammonia thrown in face by mistake: Saenger v. Locke, 9 S. D. R. 330; 175 App. Div. 963; 220 N. Y. 556; 87 S. B. 147.

Assault not connected with work:

By co-employees: Scholtzhauer v. C. & L. Lunch Co., 233 N. Y. 12; 118 S. B. 114; Schlener v. American News Co., 31 S. D. R. 217; 210 App. Div. 511; 240 N. Y. Rep. 622; 133 S. B. 74; 140 S. B. 51, 52; Stillwagon v. Callan Bros., 183 App. Div. 141; 224 N. Y. Rep. 714; 97 S. B. 121; Douglas v. Kenn-Well Contracting Co., 249 N. Y. Rep. 609; 161 S. B. 24, 25, 39; DeClemente v. N. Y. State Rys., 246 App. Div. 649; 188 S. B. 81.

By discharged employee of owner of employer's premises: Magill v. Cunard White Star Limited, 275 N. Y. Rep. 568; 204 S. B. 73.

By insane intruder: Chaloux v. Royal Knitting Co., 256 N. Y. Rep. 567; 177 S. B. 116.

By strikers: Lampert v. Siemons, 235 N. Y. 310; 118 S. B. 94; Bonnafoux v. Downtown Athletic Club, 268 N. Y. Rep. 657; 188 S. B. 57.

By robber: Willmus v. U. S. Hoffman Machinery Co., 216 App. Div. 616; 149 S. B. 55.

By other outsiders: Aierlo v. Haft & Feldman, 36 S. D. R. 674; 247 N. Y. Rep. 602; 156 S. B. 62; Coope v. Loew's Gates Theatre, 215 App. Div. 259; 149 S. B. 53; Regan v. Metropolitan Life Insurance Co., 241 App. Div. 894; 188 S. B. 85.

Compare "Assault connected with employment" under "Incidental Work, Etc.," above. See also 162 S. B. 42–45.

Automobiles, operation of: Using employer's automobile for own purpose: Pflug v. Roesch & Klinck, 229 App. Div. 54; 256 N. Y. Rep. 564; 177 S. B. 108; Lansing v. Hayes, 21 S. D. R. 532; 196 App. Div. 671; 106 S. B. 115; using own automobile in employer's service: Grathwohl v. Nassau Point Club Properties, 216 App. Div. 107; 243 N. Y. Rep. 567; 149 S. B. 27; Knickman v. Zurich G. A. & L. Ins. Co., 215 App. Div. 56; 149 S. B. 65; Petrus v. Hemingway & Co., 231 App. Div. 783; 177 S. B. 112. Compare this title under "Incidental Work, Etc.," above. See 162 S. B. 33.

Bail for employer's customer, procuring: Sabatelli v. De Robertis, 192 App. Div. 873; 230 N. Y. Rep. 592; 106 S. B. 141, 142.

Ball playing (see same title under "Incidental Work, Etc.," above): Janik v. N. Y. Central R. R. Co., 234 App. Div. 642; 11 Ind. Bul. 29; Rubenstein v. Madison House Society, 239 App. Div. 867; 188 S. B. 65; Robinson v. Franklin Savings Bank, 33 S. D. R. 561; 149 S. B. 58; Donnelly v. Town of Smithtown, 260 App. Div. 819.

Bathing, washing up, etc. (see same title under "Incidental Work, Etc.," above): Davidson v. Pansy Waist Co., 240 N. Y. Rep. 584; 140 S. B. 65; Aierlo v. Haft & Feldman, 247 N. Y. Rep. 602; 156 S. B. 62; Adams v. Uvalde Asphalt Paving Co., 205 App. Div. 784; 133 S. B. 60; Fraher v. Hotel McAlpin, 31 S. D. R. 158; 210 App. Div. 817; 133 S. B. 82; McManus v. Macy & Co., 6 S. D. R. 344; 81 S. B. 92; Hall v. City of New York, 258 App. Div. 830; 282 N. Y. Rep. 708; 204 S. B. 112; Humphrey v. Marcuse, 257 App. Div. 1086; 204 S. B. 76. See also 162 S. B. 31, 32.

Bridge playing: Jacobson v. Jamaica Jewish Center, 238 App. Div. 886; 12 Ind. Bul. 81.

Buying employer's products during work hours: Joslyn v. Onelda Community, 256 N. Y. Rep. 599; 177 S. B. 94.

Casual task out of hours (compare same title under "Incidental Work, Etc.," above): Miller v. Bell Co., 234 App. Div. 148; 177 S. B. 85. See also People v. Imbesi, 235 App. Div. 636; 185 S. B. 338.

Co-employee, unintentional injury by (see also Horseplay): Saenger v. Locke, 220 N. Y. 556; 87 S. B. 147; Culhane v. Economical Garage, 195 App. Div. 108; 188 App. Div. 1; 118 S. B. 178; 97 S. B. 128. Compare same title under "Incidental Work, Etc.," above.

Coffee, going out for (compare same title and title, "Drink of water or other potable, procuring," under "Incidental Work, Etc.," above): Clark v. Voorhees, 194 App. Div. 13; 231 N. Y. 14; 106 S. B. 109; Lovett v. Buck, 260 App. Div. 824; 285 N. Y. Rep. —.

Coming to or leaving work (see also Traveling outside employer's plant): Ordinarily injury to an employee before or after hours and before reaching, or after separation from, the premises of his employment is not compensable: Kowalek v. N. Y. Consol. R. R. Co., 229 N. Y. 489; 106 S. B. 93; De Voe v. N. Y. State Rys., 218 N. Y. 318; 81 S. B. 79; Listorti v. N. Y. Central R. R. Co., 251 N. Y. 327; 177 S. B. 72, 75; White v. Consolidated Aircraft Corp., 266 N. Y. Rep. 554; 188 S. B. 48; Rayfield v. Ford Motor Sales Co., 266 N. Y. Rep. 556; 188 S. B. 57; Parisi v. Whitmore, 230 App. Div. 140; 177 S. B. 81.

In Cudahy Packing Co. v. Parramore, 263 U. S. 418; 133 S. B. 55, the United States Supreme Court held that the employer owed the employee safe approach to his premises under the Utah compensation law, but the Utah law uses the disjunctive "or" where the New York law uses the conjunctive "and": McMahon v. Mack, 220 App. Div. 375; 156 S. B. 41; Harris v. Cheney Hammer Corp., 221 App. Div. 199; 156 S. B. 44. Compare phrase "and approaches of all places where," etc., § 2, subd. 13, below.

Injury to a restaurant worker who fell on public sidewalk in front of the employer's restaurant on her way to work was held not compensable: Funarie v. Mohawk Club, 257 App. Div. 887; 204 S. B. 85.

Injury by a striker to an employee enroute to work outside regular work hours is not compensable: Lampert v. Siemons, 235 N. Y. 310; 118 S. B. 94; Bonnafoux v. Downtown Athletic Club, 244 App. Div. 850; 268 N. Y. Rep. 657; 188 S. B. 57; nor is injury by waylaying co-employees to an employee enroute homeward: Douglas v. Kenn-Well Contracting Co., 249 N. Y. Rep. 609; 161 S. B. 24, 25; nor is injury to an employee while enroute between his home and his employer's plant though he does work at his home for his employer: Scanlon v. Herald Co., 201 App. Div. 173; 118 S. B. 96; nor is injury to an employee while being transported outside work hours in his employer's vehicle if such transportation is not part of, or an incident of, the employment contract: Schultz v. Beaver Products Co., 223 N. Y. 582; aff'd., 250 N. Y. Rep. 565; 161 S. B. 26; 156 S. B. 45; Parisi v. Whitmore, 230 App. Div. 140; 177 S. B. 80, 81; Otto v. Myers, 226 App. Div. 835; 177 S. B. 82; Fay v. De Camp, 232 App. Div. 6; 257 N. Y. 407; 177 S. B. 79, 80; Patriaka v. Westchester County Park Comn., 259 N. Y. Rep. 577; 177 S. B. 78; Meo v. Bloomgarden, 237 App. Div. 325; 188 S. B. 50.

An employee endangers his compensation by loitering, lingering or returning in the act of quitting work: Adams v. Uvalde Asphalt Paving Co., 250 App. Div. 784; 133 S. B. 60; but compare Marco v. News Syndicate Co., 257 App. Div. 887; 204 S. B. 121; O'Grady v. Fidelio Brewery, Inc., 257 App. Div. 880; 204 S. B. 121. See 162 S. B. 22.

See generally 162 S. B. 21–28. Compare same title under "Incidental Work, Etc.," above.

Delivering co-employee's pay envelope: O'Keefe v. Friederich & Son, 260 App. Div. 818.

Earthquake: State Treasurer ex rel. Lux v. Feltman Bros. & Hermel, 33 S. D. R. 41; 214 App. Div. 841; 140 S. B. 25, 26.

Explosions (compare same title under "Incidental Work, Etc.," above; also title "Revolver or similar weapon," below): McCarter v. La Rock, 240 N. Y. 282; 140 S. B. 59; Gill v. Belmar Construction Co., 226 App. Div. 616; 177 S. B. 119, 120.

Extra-state accidents. See above, page 40.

Fire (see also "Explosions"; "Smoking"): Wonson v. Brookshire Const. Co., ex rel., 275 N. Y. Rep. 578; 204 S. B. 116; Pisko v. Mintz, 262 N. Y. 176; 188 S. B. 60; Briskin v. Hyman, 203 App. Div. 275; affd., 236 N. Y. Rep. 522; 118 S. B. 102; McQuivey v. International Ry. Co., 210 App. Div. 507; 133 S. B. 105; Cole v. Fleischmann Mfg. Co., 189 App. Div. 306; 97 S. B. 137; McHough v. Taylor, 214 App. Div. 842; 149 S. B. 43; but compare "Fire" under "Incidental Work, Etc.," above.

Good-bye to fellow-employee, saying: Di Salvio v. Menihan Co., 184 App. Div. 922; 225 N. Y. 123; 97 S. B. 112.

Goods produced by employer, purchase during work hours: Joslyn v. Oneida Community, 256 N. Y. Rep. 599; 177 S. B. 94.

Heat prostration not due to special hazard (compare "Heat prostration" under "Incidental Work, Etc.," above): Campbell v. Clausen-Flanagan Brewery, 183 App. Div. 499; 97 S. B. 23; Brezzenski v. Crenshaw Engineering Co., 19 S. D. R. 439; 188 App. Div. 511; 97 S. B. 26. Compare 162 S. B. 48.

Highways, traversing: See "Traveling" below.

Holiday, taking a: Johnson v. Ajax Rubber Co., 18 S. D. R. 600, 4 Bul. 91; Kessler v. N. Y. State Conservation Dept., 252 App. Div. 708; 204 S. B. 131.

Home of injured employee, installation of furnace in: Koch v. Holland Furnace Co., 227 App. Div. 833; 177 S. B. 94.

Horseplay (compare same title under "Incidental Work, Etc.," above): Frost v. Franklin Mfg. Co., 204 App. Div. 700; 236 N. Y. Rep. 649; 133 S. B. 78; 118 S. B. 118; De Fillippis v. Falkenberg, 170 App. Div. 153; 219 N. Y. Rep. 581; 81 S. B. 95; Plouffe v. American Hard Rubber Co., 211 App. Div. 298; 140 S. B. 55; Rauh v. Western Union Telegraph Co., 259 App. Div. 770; 204 S. B. 123. Compare 162 S. B. 45.

Laundering own clothes after hours: Daly v. Bates & Roberts, 14 S. D. R. 618, 3 Bul. 9; 183 App. Div. 914; 224 N. Y. 126; 97 S. B. 110.

Lightning stroke not due to special hazard: Phelps v. Stittville Canning Co., 32 S. D. R. 726; 140 S. B. 63; but compare "Lightning" under "Incidental Work, Etc.," above. See also 162 S. B. 47.

Living on employment premises (compare same title under "Incidental Work, Etc.," above): Daly v. Bates & Roberts, 224 N. Y. 126; 97 S. B. 110; Pisko v. Mintz, 262 N. Y. 176; 188 S. B. 60; Hollinger v. Fure, ex rel., 264 N. Y. Rep. 678; 188 S. B. 62; Wonson v. Brookshire Const. Co., ex rel., 275 N. Y. Rep. 578; 204 S. B. 116; Murphy v. Ludlum Steel Co., 182 App. Div. 139; 227 N. Y. Rep. 634; 87 S. B. 126; 97 S. B. 85; Kane v. Barbe, 210 App. Div. 558; 133 S. B. 67; DeMuth v. Butler, 210 App. Div. 505; 133 S. B. 68; McQuivey v. International Ry. Co., 210 App. Div. 507; 133 S. B. 105; Lauterbach v. Jarrett, 189 App. Div. 303; 97 S. B. 100; Hall v. City of New York, 258 App. Div. 830; 282 N. Y. Rep. 708; 204 S. B. 112; Tall v. Liam Holding Corp., 253 App. Div. 852; 204 S. B. 117; Lignori v. Bankers Trust Co., 251 App. Div. 760; 204 S. B. 118; Van Riper v. Newman, 250 App. Div. 801; 204 S. B. 118. Compare 162 S. B. 28.

Lunch and lunch interval (compare same title under "Incidental Work, Etc.," above): Johnson v. Smith, 263 N. Y. 10; 188 S. B. 71; Goldman v. Hancock Mutual Life Insurance Co., 276 N. Y. 582; 204 S. B. 122; Magill v. Cunard White Star Ltd., 275 N. Y. Rep. 568; 204 S. B. 73; Clark v. Voorhees, 231 N. Y. 14; 106 S. B. 109; McInerney v. Buffalo Susquehanna R. R. Co., 225 N. Y. 130; 97 S. B. 86; Groszek v. Western Union Telegraph Co., 262 N. Y. Rep., 478; 12 Ind. Bul. 135; Miller v. Bell Co., 234 App. Div. 148; 177 S. B. 85; Welby v. Pearson, 35 S. D. R. 752; 218 App. Div. 798; 156 S. B. 48, 49; Wood v. Jamestown, W. & N. Ry. Co., 188 App. Div. 985; 97 S. B. 105; Weir v. Board of Education, School District No. 10, 257 App. Div. 1087; 282 N. Y. Rep. 709; 204 S. B. 121; Rauh v. Western Union Telegraph Co., 259 App. Div. 770; 204 S. B. 123; Layton v. Spear & Co., Ltd., 261 App. Div. 856. See also 162 S. B. 28.

Machine, experimenting with: Rendino v. Continental Can Co., 186 App. Div. 924; 226 N. Y. Rep. 565; 97 S. B. 135.

Medical treatment furnished to an ill nurse by her employer, injury by: Volk v. City of New York, 259 App. Div. 247; 284 N. Y. 279.

Newspaper, gathering items for: Tafft v. Stafford, 266 N. Y. Rep. 555; 188 S. B. 69; procuring for self: McGuire v. Brooklyn Heights R. R. Co., 10 S. D. R. 631; 2 Bul. 30; 87 S. B. 153.

Pencil, recovering: Campbell v. Central R.R. Co. of N. J., 217 App. Div. 798; 149 S. B. 61; but compare Harrigan v. Conkling, 217 App. Div. 799; 149 S. B. 274.

Picnic, dinner or other gathering, attending (compare same title under "Incidental Work, Etc.," above): Melanson v. Morton & Son, 33 S. D. R. 593; 35 S. D. R. 719; 149 S. B. 59. See also 162 S. B. 23.

Picture taken, having: Stimell v. Remington Typewriter Co., 210 App. Div. 311; 133 S. B. 65.

Poison taken by mistake: O'Neill v. Carley Heater Co., 6 S. D. R. 314; 173 App. Div. 922; 218 N. Y. 414; 81 S. B. 94; Brown v. N. Y. State Training School for Girls, 259 App. Div. 946; 285 N. Y. 37.

Repairing own truck of which employer was chattel mortgagee: Freedman v. Shottenfeld & Sons, Inc., 256 App. Div. 865; 204 S. B. 131.

Rescue of children from railway train: Priglise v. Fonda, J. & G. R. R. Co., 22 S. D. R. 408; 192 App. Div. 776; 106 S. B. 117; and of girls from drowning: Goff v. Mt. Morris Illuminating Co., 30 S. D. R. 81; but compare "Rescue" above under "Incidental Work, Etc.,"

Revolver or similar weapon, unintentional injury by (compare same title under "Incidental Work, Etc.," above): Lebeda v. Pongracz, 230 App. Div. 606; 256 N. Y. Rep. 560; 177 S. B. 99, 100; De Salvo v. Jenkins, 205 App. Div. 198; 239 N. Y. Rep. 531; 118 S. B. 122; 133 S. B. 74; Culhane v. Economical Garage, 19 S. D. R. 442; 188 App. Div. 1; 195 App. Div. 108; 97 S. B. 128; 118 S. B. 178; see also "Explosions," above and references of 162 S. B. 46, 49.

Salesmen. See "Traveling" below.

Satisfying one's curiosity: Surveyor's assistant inspecting work previously done: MacMillen v. Town of Bethlehem, 255 App. Div. 741; 204 S. B. 132.

Shoes for work, procuring: Gisner v. Dunlop, 21 S. D. R. 352; 191 App. Div. 633; 106 S. B. 116; nail in, Metzger v. General Electric Co., 32 S. D. R. 144; 214 App. Div. 830; 140 S. B. 63; O'Neil v. General Electric Co., 218 App. Div. 798; 156 S. B. 68.

Sleeping, resting or waiting (compare same title under "Incidental Work, Etc.," above): Sleeping, Gifford v. Patterson, 224 N. Y. 4; 87 S. B. 155; Pisko v. Mintz, 262 N. Y. 176; 188 S. B. 60; Hollinger v. Fure, 264 N. Y. Rep. 678; 185 S. B. 481; Wonson v. Brookshire Const. Co., ex rel., 275 N. Y. Rep. 578; 204 S. B. 116; Briskin v. Hyman, 203 App. Div. 275; 236 N. Y. Rep. 522; 118 S. B. 102; Groszek v. Western Union Telegraph Co., 262 N. Y. Rep. 478; 188 S. B. 59; Rhoades v. Miller Bros. Construction Co., 270 N. Y. Rep. 518; 188 S. B. 59; Craciola v. Lewis, 233 App. Div. 437; 177 S. B. 91, 92; State Treasurer v. Cohen, 202 App. Div. 769; 118 S. B. 105; Pustinja v. Donner Steel Co., 26 S. D. R. 193; 202 App. Div. 767; 118 S. B. 105; Thomas v. Friedman White Realty Corp., 33 S. D. R. 557; 149 S. B. 56; waiting, Priestley v. Hentz & Co., 234 App. Div. 804; 258 N. Y. Rep. 618; 177 S. B. 109; Heater v. Erie R. R. Co., 210 App. Div. 497; 133 S. B. 85; Hannigan v. Technola Piano Co., 204 App. Div. 748; 133 S. B. 63; Stimal v. Jewett & Co., 205 App. Div. 170; 118 S. B. 89; Le Page v. Lee Wood Golf Club 245 App. Div. 888; 188 S. B. 60; Rauh v. Western Union Telegraph Co., 259 App. Div. 770; 204 S. B. 123. See also 162 S. B. 29, 30.

Slipper, rescuing for co-employee: Holmes v. U. S. Printing Co., 12 S. D. R. 557, 2 Bul. 93; 87 S. B. 152.

Smoking (compare same title under "Incidental Work, Etc.," above) Pisko v. Mintz, 262 N. Y. 176; 188 S. B. 60; Fischer v. Hoe & Co., 224 App. Div. 335; 161 S. B. 181; Wise v. Whalen, 241 App. Div. 900; 188 S. B. 63.

Spectacles, going home for: Smith v. Northport Water Works Co., 252 N. Y. Rep. 521; 177 S. B. 97, 98.

Sting of insect: Walde v. Olmstead, 32 S. D. R. 713; 140 S. B. 63.

Streets, traversing: Wischman v. Berrick-Meyer, 259 App. Div. 941; 204 S. B. 84. See also "Traveling" below.

Strikers, assault by (compare same title under "Incidental Work, Etc.," above): Lampert v. Siemons, 235 N. Y. 311; 118 S. B. 94; Bonnafoux v. Downtown Athletic Club, 244 App. Div. 850; 268 N. Y. Rep. 657; 188 S. B. 57; De Monico v. Weiss, 32 S. D. R. 8; 212 App. Div. 842; 140 S. B. 49, 50.

Superintendent, taking home: Johnson v. Faribault Bldg. Corp., 20 S. D. R. 453; 192 App. Div. 929; 229 N. Y. Rep. 626; 106 S. B. 114.

Swimming as diversion from work (compare "Bathing" above): McManus v. Macy & Co., 6 S. D. R. 344; 81 S. B. 92.

Taking self out of the employment: See non-incidental cases above, notes on violation of employer's rules, etc., under § 10 and note on unwitnessed accidents under § 21, below.

Tobacco, procuring (compare same title under "Incidental Work, Etc.," above): Markowitz v. National Headwear Co., 213 App. Div. 461; 140 S. B. 48. See also "Smoking," above, and references of 162 S. B. 31.

Traveling outside employer's plant—collectors, mechanics, messengers, salesmen, etc. (compare same title under "Incidental Work, Etc.," above): A salesman or other traveling employee setting out upon his employer's business does not come into his employment until he reaches a public highway and is headed for a specific objective: Freudenfeld v. Stein & Co., 271 N. Y. 548; 188 S. B. 76; Tafft v. Stafford, 266 N. Y. Rep. 555; 188 S. B. 69; Turner v. Cathedral Publishing Co., 268 N. Y. Rep. 656; 185 S. B. 73; Bach v. Schieffelin & Co., 247 App. Div. 845; 188 S. B. 73.

The Court of Appeals with opinion reversed awards in the cases of an advertisement solicitor on way from visit to family to meet prospect: Chetney v. Manning Co., 273 N. Y. 82; 204 S. B. 142; of a market salesman fatally injured while crossing a street to get a cup of coffee: Clark v. Voorhees, 231 N. Y. 14; 106 S. B. 109, a plumber intending to do a job in neighboring village incidentally to bringing his wife home: Marks v. Gray, 251 N. Y. 90; 161 S. B. 35; and an employee injured by a striker when about to board a train on his way to work: Lampert v. Siemons, 235 N. Y. 310; 118 S. B. 94; and, without opinion, reversed award to a woman bent on shopping while carrying her employer's daily bank deposit: Carroll v. Verway Printing Co., 254 N. Y. Rep. 598; 177 S. B. 103; a motor vehicle driver making a deviation adjudged to be a "frolic": Pflug v. Roesch & Klinck, 256 N. Y. Rep. 564; 177 S. B. 108; and a woman news gatherer emerging from her home: Tafft v. Stafford, 266 N. Y. Rep. 555; 188 S. B. 69. It affirmed denial of award for death of a salesman killed while traveling by night from one city to another: Barber v. Harvey & Eddy Co., 265 N. Y. Rep. 661; 188 S. B. 74.

The Appellate Division with opinion, and the Court of Appeals, without opinion, reversed award to a superintendent of a real estate development injured while setting out to it from his home: Grathwohl v. Nassau Point Club Properties, 216 App. Div. 107; 243 N. Y. Rep. 567; 149 S. B. 37. The Appellate Division, with opinion, reversed award to a printing superintendent injured while enroute home for lunch and carrying some work to be done there: Scanlon v. Herald Co., 201 App. Div. 173; 118 S. B. 96; and without opinion, award to a chauffeur going home for supper: Welby v. Pierson, 35 S. D. R. 752; 218 App. Div. 798; 156 S. B. 48, 49.

Claims for compensation were disallowed in the case of a traveling salesman injured while driving home at midnight after allegedly assisting a prospective customer in search of a business location: Daus v. Gunderman & Sons, Inc., 257 App. Div. 1094; 283 N. Y. 459; 204 S. B. 381, and in the case of a traveling salesman injured while driving home from a night club to which he had gone after attending employer's dinner: Scott v. Whitehouse & Co., 255 App. Div. 733; 280 N. Y. Rep. 742; 204 S. B. 133.

Compensation is not awardable to a salesman for injury while in a hotel as guest, Turner v. Cathedral Publishing Co., 268 N. Y. Rep. 656; 188 S. B. 73; Kass v. Herschberg, Schultz & Co., 21 S. D. R. 292; 191 App. Div. 300; 106 S. B. 79; Jakeway v. Bauer Co., 218 App. Div. 302; 149 S. B. 48; or while taking a holiday, Johnson v. Ajax Rubber Co., 18 S. D. R. 606, 4 Bul. 91; or while pleasure riding, Chase v. Certain-Teed Products Corp., 206 App. Div. 806; 133 S. B. 73; or while prospecting with a view to employment, Brown v. Rosen, 218 App. Div. 531; 149 S. B. 34; or while homeward bound, Conrad v. Meldrum Motor Corp., 250 N. Y. Rep. 564; 161 S. B. 38.

For references to other traveling cases, see 162 S. B. 37–42; 177 S. B. 304; 188 S. B. 184; 204 S. B. 133–147.

Visit to outsiders, re-entering employer's premises from: King v. Standard Oil Co. of N. Y., 184 App. Div. 453; 97 S. B. 115.

Wages (compare same title under "Incidental Work, Etc.," above): cashing check for: Cunningham v. Hunterspoint Lumber & Supply Co., 256 N. Y. Rep. 574; 177 S. B. 95; collecting from employer: Olsen v. Hulbert-Sherman Hotel Co., 210 App. Div. 537; 133 S. B. 64; Isabelle v. Bode & Co., 215 App. Div. 184; 149 S. B. 59; carrying to sick co-employee, Foster v. Mallory S. S. Co., 33 S. D. R. 577; 217 App. Div. 807; 244 N. Y. Rep. 612; 149 S. B. 46; carrying to absent co-employee: O'Keefe v. Friederich & Son, 260 App. Div. 818.

Watching premises (compare same title under "Incidental Work, Etc.," above): The courts reversed awards for deaths of night watchmen asphyxiated by escaping gas while asleep, Hollinger v. Fure, 264 N. Y. Rep. 678; 185 S. B. 481; burned while asleep on couch on premises: Wonson v. Brookshire Const. Co., ex rel., 275 N. Y. Rep. 578; 204 S. B. 116; killed at a window by a stray bullet of New Year's revellers: Lebeda v. Pongracz, 256 N. Y. Rep. 560; 177 S. B. 100; burned to death because of intoxication, Parrish v. Premier Cabinet Corp., 230 App. Div. 529; 177 S. B. 138, 139; and affirmed denials of awards to watchmen intentionally shot by a youth's toy gun: De Salvo v. Jenkins, 28 S. D. R. 56; 205 App. Div. 198; 239 N. Y. Rep. 531; 118 S. B. 112; and assaulted by aggrieved co-employees while on the way home, Douglas v. Kenn-Well Contracting Co., 224 App. Div. 798; 249 N. Y. Rep. 609; 161 S. B. 39.

The Appellate Division reversed award to the family of a night watchman for forty or fifty business places on the ground that he was an independent contractor: Spiridigliozzi v. Nicola & Balzano, 238 App. Div. 751; 188 S. B. 30.

See also 162 S. B. 36, 37, 94, 101, 102 and title "Watchmen" in indexes to Special Bulletins generally.

8. "**Death**" when mentioned as a basis for the right to compensation means only death resulting from such injury.

9. "**Wages**" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, [1]or in the case of a volunteer fireman such money rate applying in his regular vocation or the amount of the regular earnings of such volunteer fireman in his regular vocation. [*Subd. 9 am'd by L.* 1935, *ch.* 384.]

[1]Rest of subdivision added by L. 1935, ch. 384.

For the use of wages as the basis of compensation see §§ 14–17, 22, 39, § 54, subd. 6, §§ 95, 96, 112.

WAGES CONSTRUED

Bonuses: Ciarla v. Solvay Process Co., 16 S. D. R. 469, 3 Bul. 230; 184 App. Div. 629; 226 N. Y. Rep. 566; 95 S. B. 156; Wilkes v. Rome Wire Co., 184 App. Div. 626; 95 S. B. 108; Radacio v. Leerburger, 30 S. D. R. 451; 209 App. Div. 841; 140 S. B. 182; Remo v. Skenandoa Cotton Co., 189 App. Div. 367; 98 S. B. 36.

Bootblacking income: Sarli v. Gianakouros, 206 App. Div. 723; 123 S. B. 45.

Commissions: Boyle v. Zeller Lacquer Mfg. Co., 224 App. Div. 684; 161 S. B. 162; Johnson v. Remington Cash Register Co., 224 App. Div. 800; 161 S. B. 162; Gurnett v. Ross Co., 13 S. D. R. 535, 2 Bul. 126; 181 App. Div. 910; 95 S. B. 154; Robillard v. Macy & Co., 219 App. Div. 847; 156 S. B. 211.

Education and training: Nelson v. St. Francis Hospital, 249 App. Div. 910; 204 S. B. 173.

Food, living quarters, spending money: Bernsteln v. Beth Israel Hospital, 236 N Y. 268; 133 S. B. 42; Hughes v. Belmont Lunch Co., 212 App. Div. 847; 140 S. B. 182; Zubradt v. Estate of Shepherd, 180 App. Div. 20; 95 S. B. 40; 87 S. B. 177; State Treasurer ex rel. Havens v. Best, 229 App. Div. 819; 185 S. B. 228. See also 185 S. B. 228.

Gratuities: Ferro v. Sinsheimer Estate, 256 N. Y. 398; 177 S. B. 19-21.

Laundry and uniform: Bernstein v. Beth Israel Hospital, 236 N. Y. 268; 133 S. B. 42.

Profits: McCann v. McCormick's Garage, 203 App. Div. 387; 123 S. B. 28; Duffield v. Quogue Field Club, 217 App. Div. 796; 149 S. B. 201, 202; 224 App. Div. 798; 161 S. B. 159; Foland v. Breckwoldt & Co., 230 App. Div. 797; 9 Ind. Bul. 358.

Tips: Sloate v. Rochester Taxicab Co., 8 S. D. R. 498; 177 App. Div. 57; 221 N. Y. 491; 95 S. B. 154; Bryant v. Pullman Co., 19 S. D. R. 456; 188 App. Div. 311; 228 N. Y. Rep. 579; 95 S. B. 221; Cook v. N. Y. Central R. R. Co., 241 App. Div. 900 185 S. B. 228; Meyer v. North Hills Golf Club, 238 App. Div. 752; 185 S. B. 227; Mitcherson v. Pullman Co., 227 App. Div. 680; 161 S. B. 162; Begendorf v. Swift & Co., 193 App. Div. 404; 114 S. B. 91; Mahoney v. Black & White Town Taxis, 24 S. D. R. 396; 195 App. Div. 951; 114 S. B. 92; Radacio v. Leerburger, 30 S. D. R. 451; 209 App. Div. 841; 140 S. B. 182; Perlis v. Lederer, 19 S. D. R. 507.

Traveling expenses: Harris v. Prosperity Co., 222 App. Div. 784; 161 S. B. 163; Rowe v. Kinney Co., 235 App. Div. 904; 204 S. B. 296.

Winnings: Dearborn v. Peugeot Auto Import Co., 7 S. D. R. 413; 95 S. B. 154.

The Court of Appeals has interpreted this subdivision in Ferro v. Sinsheimer Estate, 256 N. Y. 398, 177 S. B. 19–21. See also Johnson v. Roosevelt Memorial Association, 259 N. Y. Rep. 641; 185 S. B. 225; Duffield v. Quogue Field Club, 224 App. Div. 798; 161 S. B. 159.

10. "**State fund**" means the state insurance fund provided for in article *five of this chapter.

11. "**Child**" shall include a posthumous child, a child legally adopted prior to the injury of the employee; and a step-child or acknowledged illegitimate child dependent upon the deceased. [*Subd.* 11 *am'd by L.* 1916, *ch.* 622; *and L.* 1917, *ch.* 705.]

Compare §§ 16, 115.

"CHILD" DEFINED

Death benefits were awarded to a child dependent upon a grandparent though its parents were living and able to support it: Yeople v. Rose Co., 3 Bul. 5; 182 App. Div. 438; 223 N. Y. Rep. 687; 95 S. B. 120, but death benefits were denied to a child dependent upon the parent of its foster parent: Winkler v. N. Y. Car Wheel Co., 181 App. Div. 239; 95 S. B. 102, and to an adopted child for death of its natural parent: McNally v. Robertson Co., Case No. 593288, October 21, 1921.

Adopted children. Death benefits were awarded to a child adopted under Indian tribal laws: Jackson v. Sherman Paper Co., 10 S. D. R. 605.

Death benefits of an adopted child do not cease because of readoption or other termination of its dependency: Munck v. N. Y. & Queens E. L. & P. Co., 24 S. D. R. 627, 6 Bul. 79.

Death benefits were denied to a child dependent upon the parent of its foster parent: Winkler v. N. Y. Car Wheel Co., 181 App. Div. 239; 95 S. B. 102, and to an adopted child for death of its natural parent: McNally v. Robertson Co., Case No. 593288, October 21, 1921.

Illegitimate children. The term "illegitimate child" is defined by § 59 of the General Construction Law as added by L. 1925, ch. 515.

The inclusion of acknowledged illegitimate children by L. 1917, ch. 705, partly offsets the decisions in Bell v. Terry & Tench Co., 177 App. Div. 123, 95 S. B. 97; and Berger v. Shadboldt Mfg. Co., 8 S. D. R. 460.

Awards to illegitimate stepchildren were affirmed in Larsen v. Harris Structural Steel Co., 230 App. Div. 280; 185 S. B. 121; Wujtowicz v. American Radia-

* Renumbered article six by L. 1935, ch. 255.

tor Co., 226 App. Div. 836; 8 Ind. Bul. 634; Lindfors v. Wheeler, 187 App. Div. 961; 95 S. B. 97; and Beals v. Eureka Paper Co., 183 App. Div. 914; 95 S. B. 97.

Award of death benefits to an acknowledged illegitimate posthumous dependent child was affirmed in Fludd v. Demps, 261 App. Div. 858. Acknowledgment of posthumous illegitimate children failed in McLean v. Thatcher Process Co., 214 App. Div. 842; 149 S. B. 182; and Munn v. Great Lakes D. & D. Co., 33 S. D. R. 144; 140 S. B. 163.

The court sustained award of death benefits to illegitimate children, holding that under the Decedent Estate Law they were not entitled to share in the wrongful recovery from a third party previously obtained by their mother on their behalf while believing herself a lawful widow: Battalico v. Knickerbocker Fireproofing Co., 250 App. Div. 258; 204 S. B. 472.

Posthumous children. Death benefits were awarded to a child begotten after the accident: Crockett v. International Ry. Co., 176 App. Div. 45; 95 S. B. 85; Weiss v. Amberg, 220 App. Div. 795; 156 S. B. 195.

Award of death benefits to an acknowledged illegitimate posthumous dependent child was affirmed in Fludd v. Demps, 261 App. Div. 858. Acknowledgment of posthumous illegitimate children failed in McLean v. Thatcher Process Co., 214 App. Div. 842; 149 S. B. 182; and Munn v. Great Lakes D. & D. Co., 33 S. D. R. 144; 140 S. B. 163.

Stepchildren. Death benefits were awarded to stepdaughters of common law marriages in Dodd v. 461 Eighth Ave. Co., 16 S. D. R. 427; 227 N. Y. Rep. 597; 97 S. B. 13; Brooks v. Williams Construction Co., 261 N. Y. Rep. 679; 185 S. B. 122, and to stepchildren whose divorced father was living and liable for their support in Shanley v. Slattery Contracting Co., 232 App. Div. 860; 10 Ind. Bul. 197.

For voidness of second marriage as affecting benefits to child of first marriage, see Lindemann v. Reid Ice Cream Corp., 222 App. Div. 700; 156 S. B. 195.

Award of death benefits to an acknowledged illegitimate posthumous dependent tural Steel Co., 230 App. Div. 280; 185 S. B. 121; Wujtowicz v. American Radiator Co., 226 App. Div. 836; 8 Ind. Bul. 634; Lindfors v. Wheeler, 187 App. Div. 961; 95 S. B. 97; and Beals v. Eureka Paper Co., 183 App. Div. 914; 95 S. B. 97.

12. "**Insurance carrier**" shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly under the provisions of [1]subdivisions three [2]or four of section fifty. [*Subd.* 12 *am'd by L.* 1922, *ch.* 615.]

[1] Word "subdivisions" substituted for word "subdivision" by L. 1922, ch. 615.

[2] Words "or four" inserted by L. 1922, ch. 615.

13. "**Manufacture,**" "**construction,**" "**operation**" and "**installation**" shall include "repair," "demolition," "[1]fabrication" and "alteration" and shall include all work done in connection with the repair of plants, buildings, grounds and approaches of all places where any of the hazardous employments are being carried on, operated or conducted. [*Subd.* 13 *added by L.* 1916, *ch.* 622; *am'd by L.* 1917, *ch.* 705; *and L.* 1922, *ch.* 615.]

[1] Word "fabrication" inserted by L. 1922, ch. 615.

This subdivision covers repair of an article in a retail store operated by the manufacturer of the article: Caplan v. Belber Trunk & Bag Co., 18 S. D. R. 563, 4 Bul. 54; 97 S. B. 225; or repair of an article anywhere by its manufacturer: McDowell v. New Film Corp., 3 Bul. 10; 183 App. Div. 910; 97 S. B. 225; also painting a sign of a retail store operated by the manufacturer of articles sold therein: Kohlhaus v. Regal Shoe Co., Claim No. 56218; 183 App. Div. 911, 912; 97 S. B. 225.

*§ 3. **Application. 1. Hazardous employments.** Compensation shall be payable for injuries or death incurred by employees in the following employments:

Group 1. Canning of:

Fish	Fruit
Foodstuffs	Vegetables

See also Group 8, below.

Vegetables. This covers the gathering of beans from the vines by an employee in a factory that cultivates the vines: Clarke v. Sherman, 15 S. D. R. 602; 184 App. Div. 921; 97 S. B. 84.

Group 2. Care of:

Buildings	Trees
Grounds	

Buildings. Compare note relative to "Janitors" under Group 12, notes relative to "Building care, etc.," and "Window cleaning" under Group 13, note relative to "Domestic servants' under Group 19, below.

The Court of Appeals held a corporation managing city building properties liable for compensation to one of its outside men: Griffin v. Cruikshank Co., 253 N. Y. 303; 177 S. B. 49, 50; and held a similar corporation liable for damages as a third party for a window cleaner's death: Kindga v. Noyes Co., 260 N. Y. Rep. 521; the Appellate Division held the owner and not the agent to be the employer of an employee hurt while doing janitorial work: Buncamper v. Loft, 225 App. Div. 836; 177 S. B. 49. An insurance policy may not be written to cover a real estate management concern and the several owners of buildings serviced by it: Opinions of Attorney-General, February 19 and 28, 1934. Re liability of a building's owner for compensation to a helper taken on by its superintendent or janitor, see Mosley v. Rosenstein Estate, 264 N. Y. Rep. 497; 13 Ind. Bul. 78; Russell v. 231 Lexington Ave. Corp., 236 App. Div. 177; 185 S. B. 251, 252; and Brew v. Evey Holding Corp., 238 App. Div. 885; 12 Ind. Bul. 80.

Grounds. Real estate dealer cases are: O'Dell v. Bowman, 19 S. D. R. 523, 4 Bul. 166; 189 App. Div. 386; 97 S. B. 146; and Seitz v. Law, Case No. 513446; 209 App. Div. 841; 133 S. B. 97.

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* This new § 3, subd. 1, substituted by L. 1922, ch. 615, for old § 2. The old and new sections cover the same employments with a few exceptions indicated in proper connection. The alphabetical rearrangement of former groups one to forty-two, inclusive, is the main change. Compare § 55, below. For interpretation of the term "hazardous employments" see Ward & Gow v. Krinsky, 259 U. S. 503; 118 S. B. 10. For cases under any particular employment, e. g., "Carpentry," "Moving pictures," "Printing," see indexes to No. 204 and preceding Special Bulletins; see generally, 162 S. B. 54–65.

Group 3. Construction of:

Bridges
Buildings
Car shops
Conduits
Curbs
Dams
Dynamos
Electric light and power lines or appliances
Electric railways
Highways
Incline railways
Machine shops
Manufacturing plants
Power plants
Railways
Sewers
Sidewalks
Steam plants
Steam railways
Steel bridges and buildings
Street railways
Structures of all kinds
Subaqueous works
Subways
Telegraph lines
Telephone lines

For definition of the term "construction" see above, § 2, subd. 13.

Concerning coverage of architects' employees by this Group 3, see Opinion of Attorney-General, August 26, 1935.

Bridges. Taking in danger signal lanterns is not incidental to bridge repairing: Ruane v. City of N. Y., Death File, No. 27891; 181 App. Div. 912; 87 S. B. 117.

Buildings. Calcimining is not construction or repair of a building: Hungerford v. Bonn, 183 App. Div. 818; 97 S. B. 55, 56.

The Appellate Division has affirmed an award to a handyman of a real estate company injured while fitting glass into a partition: Bredow v. Naughton & Co., 8 S. D. R. 437; 175 App. Div. 958; 87 S. B. 117.

Electric light and power lines. For extra-state accidents to light and power line employees, see Bradford Electric Light Co. v. Clapper, 286 U. S. 145; 177 S. B. 199; Leary v. Daley & Co., 261 N. Y. Rep. 552; 188 S. B. 124; Ralston v. N. Y. State Electric & Gas Corp., 236 App. Div. 766; 11 Ind. Bul. 389.

Highways. Failure to secure workmen's compensation voids public highway contracts: State Finance Law, § 142; General Municipal Law, § 90. Highway work may or may not be seasonal: Damm v. Schreier Contracting Co., 235 App. Div. 478; 185 S. B. 199, 202; Hogan v. Onondaga County, 221 App. Div. 636; 156 S. B. 207; Kittle v. Town of Kinderhook, 214 App. Div. 345; 217 App. Div. 809; 244 N. Y. Rep. 612; 140 S. B. 37; 156 S. B. 209. Superintendents are not employees: Youngman v. Town of Oneonta, 204 App. Div. 96; 236 N. Y. Rep. 521; 118 S. B. 31, but see topic "Town Superintendents of Highways," under § 2, subd. 4, above, page 24. Extra-state excavation of sand for New York road building is the issue in Cameron v. Ellis Construction Co., 252 N. Y. 394; 253 N. Y. Rep. 559; 177 S. B. 207-210.

See also Brandow v. Town of Coxsackie, 215 App. Div. 732; affd., 242 N. Y. Rep. 578; 149 S. B. 44, 45; Roosevelt v. Town of Mt. Pleasant, 214 App. Div. 843; 149 S. B. 63; Ahles v. Village of Catskill, 219 App. Div. 213; 149 S. B. 161, 162; Gillette v. Rochester Vulcanite Paving Co., 224 App. Div. 319; 249 N. Y. Rep. 608; 161 S. B. 27; Schiller v. Stattle, 236 App. Div. 766; 11 Ind. Bul. 390; Nellis v. Town of Ohio, 239 App. Div. 862; 12 Ind. Bul. 137; Peterson v. Harrison Engineering & Construction Corp., 239 App. Div. 869; 12 Ind. Bul. 169. Compare, below, Group 7, operation of vehicles, Group 13, road building, Group 17, municipal employees. See also title "Highways" in 162 S. B. 261; 177 S. B. 299; 188 S. B. 181.

Group 4. Installation of:

Boilers
Dynamos
Electric light and power lines or appliances
Elevators
Engines, stationary
Fire escapes
Heating apparatus
Lighting apparatus
Machinery, heavy
Pipes
Telephones

For definition of the term "installation" see above, § 2, subd. 13.

Boilers, engines, machinery. Installation of water tanks is not "installation of . . . boilers, engines or heavy machinery": Maloney v. Levy & Gilliland Co., 176 App. Div. 470, 87 S. B. 82.

Heating apparatus. For denial of compensation to employee injured while installing furnace bought from his employer in own home, see Koch v. Holland Furnace Co., 227 App. Div. 833; 177 S. B. 94.

Group 5. Laying of:

Cables
[1]Floor coverings
Pipes
Tiles
Wires

[1] Added by L. 1941, ch. 221.

Group 6. Manufacture of:

Acids
Adding machines
Aeroplanes
Agricultural implements
Aircraft
Alcohol
Ammonia
Ammunition
Anchors
Artificial ice or stone
Asbestos
Asphalt
Asphalted paper
Automobiles
Baby carriages, toy
Bags, cloth and paper
Barrels
Baskets
Beds
Bedsprings
Belting
Bicycles
Biscuits
Blacking or polish for shoes
Blankets
Boats, small
Boilers
Bolts
Bone articles
Boots
Boxes
Brick
Brooms
Brushes
Butter
Buttons
Cables
Calcium carbide
Cameras and supplies
Candles
[1]Candy
Canoes
Canvas
Caps
Cardboard boxes
Carpets
Carpet sweepers
Carriage mountings
Carriages
Cash registers
Castings
Cattle foods
Celluloid
Cement

Group 6. Manufacture of (Continued):

Cereals
Charcoal
Cheese
Cheese boxes
Chemical preparations, noncorrosive
Chemicals
Cigarettes
Cigars
Cloth
Clothing
Coffins
Collars
Color
Concrete blocks
Condiments
Confectionery
Cordage
Corrosive acids or salts
Corrugated paper boxes
Corsets
Crackers
Cutlery
Dairy products
Door screens
Doors
Drugs
Dyes
Electric fixtures
[1]Elevators
Engines, heavy and traction
Excelsior
Explosives
Extracts
Fabrics
Fabrics, articles from
Felt
Fertilizers
Fibre
Films for pictures
Firearms
Fire-proofing
Fixtures, water, gas or electric
Foodstuffs
Forgings
Furnaces
Furniture
Furs
Gas fixtures
Gases
Gasoline
Gelatine
Glass
Glass products and wares
Gloves
Glue
Gold ware
Gun powder
Hardware
Harness
Hats
Headings
Hemp or manila products
Hose, rubber
Hosiery
Ice, artificial
[1]Ice cream
Ink
Implements, agricultural
Instruments
Interior woodwork
Iron, stuctural
Ivory articles
Japans
Jewelry
Kegs
Leather goods and products
Light machines
Liquors
Locomotives
Machinery
Machines, adding, light and threshing
Malt liquors
Manila or hemp products
*Maltesses
Mattresses
Meat products
Meats
Medicines
Men's clothing
Metal articles, beds, instruments, toys, utensils and wares
Metal products, sheet
Metal, structural

* So in original; probably unremoved "dead line" for "mattresses" following.

Group 6. Manufacture of (Continued):

Milk products
Mineral water
Motor vehicles
Mouldings
Moving picture films and machines
Nails
Oil
Organs
Paint
Paper
Paper boxes
Paper, tarred, pitched or asphalted
Paste
Paving blocks and material
Perfumes
Petroleum and products thereof
Pharmaceutical preparations
Photographic cameras and supplies
[2]Pianos
Pipes
Pitched paper
[1]Plaster, compounds of
Plated ware
Polish for shoes
Porcelain
Pottery
Printers' rollers
Printing ink
Pyroxylin and its compounds and plastics
Rails
Rattan ware
Registers, cash
Robes
Ropes
Rubber goods
Saddlery
Safes
Salts, or acids, corrosive
Sanitary fixtures
Screens, window and door
Screws
Shades, window
Shafting
Sheet metal and products thereof
Shell articles
Shirts
Shoddy
Shoe blacking or polish
Shoes
Silver ware
Sleighs
Soaps
Socks
Soda water
Spices
Spirituous liquors
Spokes
Stationery
Staves
Steel, structural
Stockings
Stone, artificial
Stoves
Structural steel, iron or metal
Sweepers, carpet
Tar
Tarred paper
Terra-cotta
Textiles
Textiles, articles from
Thread
Threshing machines
Tile
Tires, rubber
Tobacco and products thereof
Toilet preparations
Tools
Toys, metal and wooden
Traction engines
Trunks
Tubing, metal and rubber
Tubs
Turpentine
Typewriters
Umbrellas
Utensils
Valises
Varnish
Vats
Vehicles
Veneer
Wagons
Wallpaper

Group 6. Manufacture of (Continued):

Water fixtures	Wine
Waters, mineral or soda	Wire and wire goods
Wax	Women's clothing
White [2]ware	Wooden articles
Wicker ware	Woodwork, interior
Window screens and shades	Yarn

[1] Added by L. 1922, ch. 615.
[2] Former § 2 had both "pianos" and "piano actions".
[3] "Wear" changed to "ware" by L. 1922, ch. 615.

For definition of the term "manufacture" see above, § 2, Subd. 13.

Aircraft. Compare "Aeroplanes" and "Aircraft" and under Group 7 below. For operation and demonstration in connection with manufacture, consult Jolly v. Cantilever Aeroplane Co., 5 Bul. 183; 114 S. B. 118.

Brick. Repairing machinery used to make brick is incidental to brick making: Smith v. Washburn & Co., Case No. 18733; 183 App. Div. 911; 224 N. Y. Rep. 619; 97 S. B. 135.

Buttons. Piece work makers of buttons are employees: Opinion of Attorney-General, February 27, 1935.

Cattle foods. Manufacture of stock tonics is manufacture of cattle foods: Markham v. United Breeders Co., 4 S. D. R. 390; 175 App. Div. 957; 87 S. B. 63.

Chemicals and drugs. Pharmacies should carry workmen's compensation insurance: Opinions of Attorney-General, November 16, 1933, and April 24, 1934. Building a shelf is incidental to employment in a wholesale drug establishment: Larsen v. Paine Drug Co., 169 App. Div. 838; 218 N. Y. 252; 81 S. B. 189. The Attorney-General argued that mixing the ingredients of a vermin exterminator constituted manufacture of chemicals in Johnson v. Keefer Mfg. Co., 204 App. Div. 852; 118 S. B. 43.

Clothing, fabrics and textiles. For coverage of garment alterations by retail clothing stores, see Mattura v. Price & Co., 11 S. D. R. 635; 179 App. Div. 952; 87 S. B. 89; Smith v. Gold, 9 S. D. R. 376; — App. Div. —, Nov. 1916; 87 S. B. 139. This does not cover mere wholesale dealing in dress trimmings: Kass v. Herschberg, Schutz & Co., 21 S. D. R. 292; 191 App. Div. 300; 106 S. B. 79.

Confectionery. The Appellate Division affirmed an award against a candy maker: Nastacos v. Orfan, Case No. 1965473; 198 App. Div. 951; 118 S. B. 147; and an ice cream maker: Smith v. Snyder, 206 App. Div. 786; 133 S. B. 94. Candy and ice cream have been specifically inserted in this group by L. 1922, ch. 615.

Dairy products. The Appellate Division reversed an award in the case of a butter-maker injured before the addition of dairy products by L. 1916, ch. 622: Pardy v. Boomhower Grocery Co., 11 S. D. R. 609, 2 Bul. 43; 178 App. Div. 347; 87 S. B. 71; but affirmed an award in the case of a milk handler who cut his finger while washing bottles: Rodgers v. Borden's Condensed Milk Co., Death File, No. 27351; 182 App. Div. 906; 87 S. B. 73. See also Beckmann v. Oelerich & Son, 174 App. Div. 353; 87 S. B. 73. Compare dairy and milk route cases, Glieimi v. Netherland Dairy Co., 254 N. Y. 60; 177 S. B. 33; Van Gee v. Korts, 252 N. Y. 241; 177 S. B. 75; Coman v. Model Dairy Co., 210 App. Div. 503; 133 S. B. 71; Neubeck v. Doscher, 204 App. Div. 617; 123 S. B. 66; Baik v. Queen City Dairy Co., 184 App. Div. 631; 97 S. B. 73; New Amsterdam Casualty Co. v. Commercial Casualty Ins. Co., 129 Misc. 466; 156 S. B. 244; Klein v. Borden's Farm Products Co., 228 App. Div. 741; 9 Ind. Bul. 113; Faik v. Midland Dairy Co., 242 App. Div. 668; 266 N. Y. Rep. 559; 248 App. Div. 929; 15 Ind. Bul. 359; 188 S. B. 70; 273 N. Y. Rep. 616; 16 Ind. Bul. 165; Laduke v. Martin, 261 App. Div. 344.

Furs. Compare "Work as Furriers," Group 12, below.

Glass, glass products and wares. Compare § 3, subd. 2, grs. 6, 19, arsenic poisoning and glassworkers' cataract.

For a case involving the making of mirrors, see McQueeney v. Sutphen & Myer, 167 App. Div. 528; 81 S. B. 392.

Moving picture films and machines. Alteration and repair of films incidental to their distribution are covered: McDowell v. New Film Corp., 3 Bul. 10; 183 App. Div. 910; 87 S. B. 75; and acting in the taking of a moving picture: Madderns v. Fox Film Corp., 29 S. D. R. 419; 205 App. Div. 791; 237 N. Y. Rep. 614; 133 S. B. 160; 222 App. Div. 785; 161 S. B. 21; Washington v. Fox Film Corp., 25 S. D. R. 626; compare, however, Michel v. American Cinema Corp., 182 N. Y. S. 588; 106 S. B. 60. Moving picture machiners are covered by group 12, below.

Plated ware. Nickel plating was held to be a hazardous employment: Brothers v. Stockfeld, 252 App. Div. 905; 204 S. B. 174.

Sheet metal products. The court affirmed an award to an employee injured while cutting sheet metal though the employer claimed to be a "steel merchant": Colleran v. Hogan & Son, Case No. 1020722; 198 App. Div. 982; 118 S. B. 44.

Shoes. Repair of shoes in shoe repair shops is covered: Santello v. Bell Bros., 188 App. Div. 946; 97 S. B. 71; Opinion of Attorney-General, August 1, 1935.

Soda water. The Appellate Division affirmed an award against the employer of a soda dispenser: Nastacos v. Orfan, Case No. 1965473; 198 App. Div. 951; 118 S. B. 147.

Trunks. Repair of trunks in retail stores belonging to the manufacturer of the trunks is covered: Caplan v. Belber Trunk and Bag Co., 18 S. D. R. 563, 4 Bul. 54; 97 S. B. 225.

Group 7. Operation of:

Aeroplanes
Air craft
[2]Baling machines
Barges
Boats
Boilers, stationary
Cables, telegraph
Car shops
Cars
Dynamos
Electric light and power lines or appliances
Electric railways
Electric vehicles, rollers and engines
Elevators, freight, passenger and grain
Engines, stationary and traction
Gas vehicles, rollers and engines
Gas wells
Gasoline vehicles, rollers and engines
Grain elevators
Hand trucks
Horse drawn vehicles, rollers and engines
Incline railways
Lighters
Machine shops
Oil wells
Plants, power and other
[2]Pressing machines
Railways
Rollers
Ships
Stationary engines and boilers
Steam plants
Steam railways
Street railways
Telegraph lines
Telephone lines
[1]Threshing machines
Traction engines
Transports
Trucks
Tug boats
Vehicles
Vessels
Wagons
Waterworks

[1] Added by L. 1922, ch. 615.

[2] Added by L. 1937, ch. 563.

For definition of the term "operation" see above, § 2, subd. 13.

Aircraft. Compare "Aeroplanes" and "Aircraft" under Group 6, above. A hydro-aeroplane resting or moving in navigable waters is subject to admiralty jurisdiction: Reinhardt v. Newport Flying Service Corp., 232 N. Y. 115; 118 S. B. 210. See also People ex rel. Cushing, 206 App. Div. 642, 726; 133 S. B. 95.

Electric light and power lines or appliances. Moving picture machines were held not to be electric appliances under former gr. 12: Balcom v. Ellentuch & Yarfitz, 12 S. D. R. 553; 179 App. Div. 548; 87 S. B. 59. Theatrical electricians and moving picture machiners are covered by gr. 12, below.

Elevators. L. 1916, ch. 622, amending Gr. 22 to cover freight and passenger elevators offset opinion and decision in Wilson v. Dorflinger & Sons, 218 N. Y. 84; 81 S. B. 107–109. The Court of Appeals has since decided cases of elevator accidents in Smith v. Bartle Mfg. Corp., 228 N. Y. Rep. 564; 106 S. B. 171; 97 S. B. 156; Prattinger v. Maiden Lane Realty Co., 36 S. D. R. 538; 250 N. Y. Rep. 593; 161 S. B. 48; Ferro v. Sinsheimer Estate, 256 N. Y. 398; 177 S. B. 19–21; Grant v. Bassett Estate, 254 N. Y. Rep. 533; 177 S. B. 69; Brenchley v. International Heater Co., 254 N. Y. Rep., 536; 177 S. B. 146; and Moscon v. Thomford, 260 N. Y. Rep. 578; 11 Ind. Bul. 438. For a complicated elevator case, decided with opinion, see Russell v. 231 Lexington Ave. Corp., 236 App. Div. 177; 185 S. B. 365, and for numerous other Appellate Division decisions see 162 S. B. 36, 154, and title "Janitors" in indexes to Special Bulletins and Industrial Bulletin. Repairing its doors is incidental to operating an elevator: Cary v. Frambro Realty Co., 3 Bul. 44; 183 App. Div. 910; 87 S. B. 113.

Remedy of a child injured while operating an elevator in violation of the Labor Law lies solely in the Workmen's Compensation Law: Noreen v. Vogel & Bros., 231 N. Y. 317; 106 S. B. 173; Robilotto v. Bartholdi Realty Co., 104 Misc. 419; 97 S. B. 161.

Hand trucks. A "dolly" is a hand truck: Manigault v. Beaumont & Son, 227 App. Div. 259; 177 S. B. 51, 52. Compare Holtz v. Greenhut & Co., 175 App. Div. 878; 87 S. B. 75.

Oil wells. The Board denied death benefits to the widow of a geologist whose employers were oil engineers: Rogers v. Levering Co., 26 S. D. R. 377.

Railways. See Introduction, above, subtitle "Interstate Commerce Jurisdiction."

Telegraph lines. Contracts of telegraph lines with other corporations figure in Sharpe v. Queensboro Corp., 252 N. Y. Rep. 622; 185 S. B. 264; and Buckley v. Western Union Telegraph Co., 202 App. Div. 766; 114 S. B. 110.

Threshing machines. Prior to insertion of threshing machines by L. 1922, ch. 615, the Appellate Division held that operators of them were not farm laborers and that they were vehicles while moving from place to place: Vincent v. Taylor Bros., 180 App. Div. 818; 185 App. Div. 901; 97 S. B. 69; 87 S. B. 80; White v. Loades, 178 App. Div. 236; 87 S. B. 80.

Vehicles: See also Work as chauffeurs, drivers and teamsters, Group 12, below. In the absence of federal legislation accidents to employees operating trucks and other vehicles in interstate commerce are compensable: Smith v. Lavine, 231 App. Div. 774; 177 S. B. 50, 51.

The *business* of operating vehicles is covered by this group, so that accidents to the following employees are compensable: a stableman who does no driving: Costello v. Taylor, 217 N. Y. 179; 81 S. B. 183; a driver putting his horse in its stall: Smith v. Price, 168 App. Div. 421; 81 S. B. 186; a helper on an automobile truck: Hendricks v. Seeman Bros., 170 App. Div. 133; 81 S. B. 190; Lisa v. Esposito, 252 App. Div. 907; 204 S. B. 174; an expressman leaving his vehicle to deliver a package: Miller v. Taylor, 173 App. Div. 865; 81 S. B. 191; a taxicab starter slipping on a hotel stairway: David v. Town Taxi Co., 7 S. D. R. 464; 175 App. Div. 958; 87 S. B. 89; a driver helping to fix a hand elevator used by him to deliver his load into a basement: Kasper v. Clark & Wilkins Co., 7 S. D. R. 454; 175 App. Div. 958; 87 S. B. 113; and a driver removing barrels from his employer's basement: King v. Gross & Co., File No. 7766; 179 App. Div. 966; 87 S. B. 62.

A driver of a meat wagon who had put up his horse several hours before and was injured while making deliveries afoot was denied compensation: Newman v. Newman, 169 App. Div. 745; 218 N. Y. 325; 81 S. B. 86; also a driver of a florist wagon injured while adjusting a customer's window box: Glatzl v. Stumpp, 6 S. D. R. 397; 141 App. Div. 901; 220 N. Y. 71; 87 S. B. 159 (award reversed by Court of Appeals with opinion); also a driver for a coal and wood firm injured while splitting wood: Casterline v. Gillen, 14 S. D. R. 610, 3 Bul. 13; 182 App. Div. 105; 87 S. B. 114; also an employee injured while loading a vehicle, his sole duty connected with the vehicle being the loading of it: Hassen v. Elm Coal Co., 184 App. Div. 715; 97 S. B. 72; also a superintendent of milk routes injured while on his way by street car to go upon a route and instruct a new driver: Balk v. Queen City Dairy Co., 184 App. Div. 631; 97 S. B. 73. The Appellate Division affirmed denial of award for fatal injury to the driver of a milk delivery sleigh upon ground that he was a farm laborer: Stickle v. Smith & Son, 26 S. D. R. 379; 202 App. Div. 773; 118 S. B. 44.

Claim for compensation was dismissed where an employer operated a farm, a retail feed business and a trucking business and his sole employee, who performed work in connection with each, injured his knee while carrying feed from the feed store to a customer's car: Harter v. Andrus, 259 App. Div. 942; 204 S. B. 174.

The dangers of the street are incidental to operation of a vehicle: Putnam v. Murray, 6 S. D. R. 355; 7 S. D. R. 407; 174 App. Div. 720; 87 S. B. 115. Death benefits were affirmed in the cases of a chauffeur commandeered by the police: Babington v. Yellow Taxi Corp., 250 N. Y. 14; 161 S. B. 41; a driver fatally hurt while asleep on a ferry boat: Corrina v. De Barbieri, 247 N. Y. 357; 156 S. B. 69; and a driver struck by lightning, Cummings v. Bruce & Drake, 231 App. Div. 775; 177 S. B. 53, 54; the Appellate Division affirmed awards to drivers injured while alighting at their own homes for meals, Gorey v. Kahn, 214 App. Div. 746; 149 S. B. 42; Berwanger v. Van Iderstine Co., 231 App. Div. 782; 177 S. B. 51. Compare "Traveling" and other topics under "Arising out of and in the course of employment" notes to § 2, subd. 7, above.

Hand sleds are not vehicles: Rice v. All-Package Grocery Stores, 19 S. D. R. 473, 4 Bul. 130. Snow conveyors or scrapers are vehicles: Berg v. Hetzler Bros., 2 Bul. 50; 179 App. Div. 551; 222 N. Y. Rep. 645; 87 S. B. 77. Compare "movers" under gr. 12, below.

An employer cannot stand in the relation of the third party to his employee driver making a delivery from one place to another: Winter v. Doelger Brewing Co., 95 Misc. 150; 175 App. Div. 796; 226 N. Y. Rep. 581; 87 S. B. 251.

Operation of a vehicle by an employee for transporting himself, or operation of a vehicle by an employer for transporting his employees, is within the coverage of this group, though the employer's business is not hazardous, though the employee owns the vehicle or though the injured employee is not himself operating the vehicle at the time of the accident: Mulford v. Pettit & Sons, 175 App. Div. 958; 220 N. Y. 540; 87 S. B. 172; Glatzl v. Stumpp, 220 N. Y. 71; 87 S. B. 169; Cummings v. Johnson Const. Co. 9 S. D. R. 369; 178 App. Div. 942; 87 S. B. 136, 137; McDermott v. Ingersoll & Bro., 11 S. D. R. 606, 2 Bul. 45; 178 App. Div. 943; 87 S. B. 203; Remington v. Briggs Bros. & Co., 14 S. D. R. 558, 2 Bul. 164; 179 App. Div. 966; 87 S. B. 79, 112; Benjamin v. Rosenberg Bros., 13 S. D. R. 525, 2 Bul. 126, 147; 180 App. Div. 234; 223 N. Y. Rep. 569; 95 S. B. 203; Gurnett v. Ross Co., 13 S. D. R. 535, 2 Bul. 41, 126; 181 App. Div. 910; 87 S. B. 79, 112; Savinsky v. Hicks & Sons, Case No. 32173; 181 App. Div. 910; 87 S. B. 137; Woolley v. Geneva Cutlery Co., File No. 18487; 181 App. Div. 909; 15 S. D. R. 637, 3 Bul. 156; 87 S. B. 149; Feck v. Schomske, Claim No. 18571; 184 App. Div. 922; 97 S. B. 49; Kingsley v. Donovan, 3 S. D. R. 367; 169 App. Div. 828; 81 S. B. 217; Martin v. Card & Co., 193 App. Div. 6; 106 S. B. 152; Keating v. Thompson & Starrett Co., 2 Bul. 229; 87 S. B. 137. Compare Gilmore v. Preferred Accident Ins. Co., 258 App. Div. 832; 283 N. Y. 92; 204 S. B. 191.

Injury to an employee while catching a ride on a passing vehicle may be compensable: Farrel v. Terry & Williamson S. S. Works, File No. 11666; 181 App. Div. 909; 87 S. B. 160; Vickers v. Grambo Ice Cream Co., Case No. 818681; 207 App. Div. 880; 133 S. B. 73; but compare Patriaka v. Westchester County

Park Comn., 259 N. Y. Rep. 577; 177 S. B. 78; Spinks v. Village of Marcellus, 180 App. Div. 732; 87 S. B. 161; Peers v. De Carion & Co., 5 S. D. R. 425; 81 S. B. 93.

Pecuniary gain cases turning upon double use of automobiles for pleasure and business are: Wincheski v. Morris, 179 App. Div. 600; 87 S. B. 195; and Kender v. Reineking, 19 S. D. R. 485, 4 Bul. 143; 188 App. Div. 984; 228 N. Y. 240; 106 S. B. 83.

Compare 162 S. B. 278 and title "Vehicles" in the several indexes of Special Bulletins.

Vessels. See Introduction, above, subtitle "Admiralty Jurisdiction." See also 162 S. B. 59, 95-107.

Waterworks. The Appellate Division reversed an award to an officer injured while enroute to get some lead for use on village waterpipes: Spinks v. Village of Marcellus, 180 App. Div. 732; 87 S. B. 161.

A telephone switchboard operator and receptionist in the employ of the New York City Board of Water Supply sustained accidental injuries in the course of her employment. Award was affirmed, with statement that, "She was engaged in a business classified as hazardous." Leahy v. City of New York, 260 App. Div. 966; 285 N. Y. 443.

Group 8. Preparation of:

Fish	Metals
Foodstuffs	Minerals
Fruit	Paste
Gelatine	Vegetables
Meat stuffs	Wax
Meats	

See also group 1, above.

Foodstuffs. This does not cover the ordinary preparation of meat or other foodstuffs for cooking: De La Gardelle v. Hampton Co., 167 App. Div. 617; 81 S. B. 102; but employees of certain hotels are now covered by gr. 14, below.

Group 9. Removal of:

Ashes	Garbage
Awnings	Snow

Garbage removal. Where the principal business of the employer is garbage removal, accidental injury to an employee whose sole work is sorting on the dump is compensable: Sacelli v. Marrone, 2 Bul. 91; 12 S. D. R. 543; garbage sorters are covered by gr. 12, below.

Group 10. Sinking of:

Drilled wells	Oil wells
Gas wells	Salt wells

Oil wells. The Board denied death benefits to the widow of a geologist whose employers were oil engineers: Rogers v. Levering Co., 26 S. D. R. 377.

Group 11. Storage or handling of:

Ammunition	Gasoline
Cargoes	Gun powder
Chemicals	Ice
Corrosive acids or salts	Petroleum
Explosives	

Ammunition. Death while operating a shooting gallery was held not to be due to handling explosives or ammunition under former gr. 25: Lingner v. McGrath, 17 S. D. R. 573; 3 Bul. 216; 187 App. Div. 911; 97 S. B. 67.

Chemicals. This does not cover handling of chemicals by a public school teacher: Beeman v. Board of Education of Penn Yan, 195 App. Div. 357; affd., 231 N. Y. Rep. 624; 106 S. B. 67; but does cover handling of chemicals by a private school teacher: Opinion of Attorney-General, May 7, 1934.

Gasoline. Re the Standard Oil Company's liability for compensation of filling station operators and employees, see Opinion of Attorney-General, April 17, 1933.

Group 12. Work as:

[1]Barbers
Blacksmiths
[2]Carpenters
[3]Chauffeurs
[3]Drivers
Furriers
Garbage sorters
Horseshoers
[4]Janitors
Life guards
Longshoremen
Marble workers
Masons
Movers
[5]Private or domestic chauffeurs, employed as such in cities of two million inhabitants or over, but failure to secure compensation for such private or domestic chauffeurs, as aforesaid, shall not subject the employer to the penalties prescribed in section fifty-two of this chapter
Sheet metal workers
[3]Teamsters
Theatrical electricians, fly-men, lamp operators, moving picture machiners, property men, stage carpenters and stage hands

[1] Added by L. 1922, ch. 615; compare note under group 18 below.
[2] Added by L. 1922, ch. 615; law formerly covered "structural carpentry"; compare Schmidt v. Berger, 221 N. Y. 226; 87 S. B. 174.
[3] Added by L. 1922, ch. 615; formerly covered by "operation of vehicles" only.
[4] Added by L. 1922, ch. 615; law previously covered "maintenance and care of buildings" and "heating and lighting."
[5] Added by L. 1931, ch. 510.

Barbers. Employees cutting and trimming hair in beauty parlors are barbers: People v. Sommerville, 167 Misc. 89; 204 S. B. 175; Opinions of Attorney-General, Aug. 1, 1935 and Sept. 14, 1936.

Chauffeurs, drivers, teamsters. Compare note relative to "Operation of vehicles," Group 7, above, and "Traveling" and other topics under "Arising out of and in the course of employment," notes to § 2, subd. 7, above. A jockey is an employee and is also a "driver" though riding his horse: Rice v. Stoneham, 254 N. Y. Rep. 531; 177 S. B. 37; Pierce v. Bowen, 247 N. Y. 305; 156 S. B. 28. Validity of provision relative to New York city chauffeurs was argued in Nolte v. Heineman, 242 App. Div. 884; 13 Ind. Bul. 313; and in Sullivan v. Valentine, 275 N. Y. Rep. 569; 204 S. B. 176.

Furriers. Compare "Manufacture of furs," Group 6, above; work as furriers may involve sale as well as manufacture or alteration of furs: Opinion of Attorney-General, March 9, 1935.

Janitors. Janitorship often involves the joint labors of a family; upon injury to one, the others may carry on: Spanick v. Glantz, 209 App. Div. 255; 133 S. B. 53, 54; Brines v. Estate of Aaron, 222 App. Div. 844; 161 S. B. 22; Staniszewski v. Falls National Bank, 239 App. Div. 871; 242 App. Div. 745; 13 Ind. Bul. 255; sometimes the janitor works at an outside job and his family does the janitorial work: Phillips v. N. Y. Trap Rock Co., 245 App. Div. 353; 204 S. B. 255; sometimes outsiders, relatives or others, are called in as casual

or permanent helpers: Ferro v. Sinsheimer Estate, 256 N. Y. 398; 177 S. B. 19-21; Russell v. 231 Lexington Ave. Corp., 266 N. Y. 391; 185 S. B. 251, 252, 365–368; Brew v. Evey Holding Corp., 238 App. Div. 885; 12 Ind. Bul. 80.

The Court of Appeals affirmed damages to a janitor and his wife for injury to her while assisting him: Darm v. Kletzkin, 263 N. Y. Rep 543; 188 S. B. 105; and affirmed award to a janitor for injuries by his wife: Haverhals v. Badman, 268 N. Y. Rep. 660; 188 S. B. 80. The Appellate Division affirmed benefits to a janitor for death of his wife: Mason v. 980–984 Simpson Street Corp., 239 App. Div. 294; 185 S. B. 147.

When janitor or janitress occupies living quarters on the premises of the employment, question what he or she may have been doing when hurt is often pivotal: Pisko v. Mintz, 262 N. Y. 176; 188 S. B. 60; Cilio v. Faruolo, 262 N. Y. Rep. 659; 12 Ind. Bul. 273; Lauterbach v. Jarrett, 189 App. Div. 303; 97 S. B. 100; Hanna v. Pierson Co., 194 App. Div. 944; 106 S. B. 152; Anderson v. Wheelahan, 234 App. Div. 640; 11 Ind. Bul. 28; Ferri v. 235-237 East 105th Street Corp., 241 App. Div. 898; 13 Ind. Bul. 177; Poupart v. Myers, 242 App. Div. 720; 13 Ind. Bul. 203; Shapiro v. Employers' Liability Assurance Corp., 139 Misc. 454; 177 S. B. 87; Finnegan and Chambers v. Biehn, 276 N. Y. 50; 204 S. B. 114; Dienske v. Tompkins, 255 App. Div. 735; 280 N. Y. Rep. 524; Mowen v. Chase National Bank, 252 App. Div. 801; 277 N. Y. 135; Nagengast v. Spatz, 257 App. Div. 1096; 284 N. Y. Rep. 573.

The Court of Appeals affirmed award to an outsider called in by an apartment house superintendent to carry a trunk: Mosley v. Rosenstein Estate, 264 N. Y. Rep. 497; 188 S. B. 25; and to a cleaning woman who came to work at an unusual hour and entered in an unusual way: Schrader v. Verona Operating Corp., 264 N. Y. Rep. 506; 188 S. B. 47. It held the custodian of a New York city school building liable for the compensation of an injured window cleaner: Bederman v. McNamara, 268 N. Y. Rep. 510; 185 S. B. 253.

When the janitor is a rover, question, which employer, if any, is liable, may arise: Morgan v. Bergin, 262 N. Y. Rep. 673; 188 S. B. 83; Bruen v. Revenue Properties, 236 App. Div. 869; 11 Ind. Bul. 440. For the janitor's duty to pursue intruders, see Pendl v. Haenel, 229 App. Div. 52; 177 S. B. 102. A policeman is not a janitor because detailed to care of a station house: Ryan v. City of N. Y., 18 S. D. R. 600; 189 App. Div. 49; 228 N. Y. 16; 106 S. B. 63. Running errands is not a general incident of janitorial service: Jennings v. Visscher, 217 App. Div. 417; 149 S. B. 228.

Re other janitorial cases, see 140 S. B. 182, 183; 161 S. B. 273; 162 S. B. 59, 60; 177 S. B. 30, 31, 300; 185 S. B. 572; 188 S. B. 181; 204 S. B. 112–117, 261.

Longshoremen. The special business of supplying watchmen for cargoes is not longshore work: Oberg v. McRoberts & Co., 6 S. D. R. 386; 175 App. Div. 1; 87 S. B. 57.

Rag picking in a refuse dump on the shore is not longshore work: Tomassi v. Christensen, 171 App. Div. 284; 81 S. B. 104; garbage sorters are covered by this group.

See notes on "Admiralty Jurisdiction," pp. 7-9, above.

Masons. "Demolition" is an incident of "construction": § 2, subd. 13, above; see Ciappa v. Rosenberg, 5 Ind. Bul. 137; 242 N. Y. Rep. 498; 140 S. B. 203, 204.

Theatrical employees. Benefits were affirmed for accidental deaths of theatre employees: Lasher v. Primo Producing Co., 252 N. Y. Rep. 623; 9 Ind. Bul. 108; O'Sullivan v. Wood Theatrical Co., 195 App. Div. 609; 106 S. B. 145; and compensation to a vaudeville trouper for injury outside New York State: Darrow v. Fanchon & Marco, 239 App. Div. 868; 12 Ind. Bul. 168. For Court of Appeals decisions in recent theatrical cases, see 177 S. B. 69, 93, 140; 188 S. B. 96; see also 162 S. B. 275. For identification of employer when realty corporation owns building and stock of theatrical corporation, see Opinion of Attorney-General, July 6, 1934.

Group 13. Work at:

Awning erection
Blasting
Bleaching
Boiler covering
Bookbinding
Booming timber or logs
Bottling
Bricklaying
Building care, maintenance and salvage
Cable laying or repair, underground
Canning
[1]Carpentry
Clam cultivating, harvesting, opening or planting
Cleaning clothes, streets, windows, or buildings
Concreting
Cork cutting
Decorating
Disinfecting
Dredging
Dyeing
Electrotyping
Embossing
Engraving
Excavation
Glazing
Grave digging
Heating
Ice distribution, harvesting or storage
Landscape gardening
Lighting
Lithographing
Logging
Lumbering, except operations [2]by a farmer on his own farm solely for the production of firewood or logs cut to dimension lengths and the transportation to market or to a point of shipment, provided not more than four persons are engaged by a single employer
Marble cutting
Marine wrecking
Milling
Mining
[3]Multigraphing
Oyster cultivation, planting, harvesting or opening
Ore reduction
Painting
Papering
Paving
Photo-engraving
Picture hanging
Pile driving
Pipe covering
Plastering
Plumbing
Printing
Rafting
Renovating
River-driving
Road building
Roofing
Salvaging of buildings or contents
Sea food cultivation, harvesting or planting
Shaft sinking
Ship building
Smelting
Stereotyping
Stone crushing, cutting, dressing, grinding or setting
Storage of all kinds and storage for hire
Street cleaning or construction
Structural carpentry
Subaqueous construction
Subway construction
Tree moving, planting, trimming and surgery
Tunneling
Undertaking
Upholstering
Warehousing
Well digging or drilling
Window cleaning
Wrecking, marine

[1] Word "carpentry" substituted for words "structural carpentry" by L. 1922, ch. 615. Compare Schmidt v. Berger, 221 N. Y. 226; 87 S. B. 174; and word "Carpenters" in gr. 12, above.

[2] Words "by a farmer . . . provided" substituted for words "solely for the production of firewood on farm lands, in which" by L. 1931, ch. 385.

[3] Added by L. 1922, ch. 615; the court had previously held that printing included multigraphing: Gale v. Munro, 193 App. Div. 561; 106 S. B. 181.

Bottling. Taking half-barrels of beer from a basement is incidental to the bottling business: King v. Gross, 179 App. Div. 966; 87 S. B. 114; but milking and caring for cows is not: Morse v. Willow Brook Dairy, 20 S. D. R. 392, 4 Bul. 169; 97 S. B. 147.

Building care, maintenance and salvage. Real estate agency's liability: Griffin v. Cruikshank Co., 253 N. Y. 303; 177 S. B. 50; Kindga v. Noyes Co., 260 N. Y. Rep. 521; Buncamper v. Loft, 225 App. Div. 836; 177 S. B. 49; painting material, procuring: Goldberger v. Goldberger, 209 App. Div. 840; 200 App. Div. 190; 133 S. B. 93; 118 S. B. 132; boilers, operation: Siegfried v. Goldberg, 220 N. Y. Rep. 673; 87 S. B. 62; Kammer v. Hawk, 221 N. Y. 378; 87 S. B. 66; awnings, removal: Abromowitz v. Hudson View Construction Co., 188 App. Div. 356; 228 N. Y. Rep. 509; 97 S. B. 63; firewood, cutting: Goble v. Port Jervis Water Works Co., 35 S. D. R. 716; 219 App. Div. 749; 156 S. B. 54; vermin extermination: Johnson v. Keefer Mfg. Co., 204 App. Div. 852; 118 S. B. 43. The Siegfried and Kammer decisions have been annulled by subsequent insertion of "maintenance and care of buildings" and "heating and lighting" in this group.

The Appellate Division held that guarding children on a playground was not incidental to a janitor's care of a school building: Bailey v. School District No. 5, 204 App. Div. 125; 118 S. B. 51; janitors have since been specifically covered by Group 12, above.

Compare "Carpentry," "Heating," "Lighting," "Painting," "Papering," "Pipe covering," "Plastering," "Plumbing," "Renovating," "Roofing," "Salvaging" and "Window cleaning," this group 13, and "Care and construction of buildings," groups 2 and 3, "Janitors," group 12, above.

A fireman, fighting fire, is not salvaging buildings or their contents: Krug v. City of N. Y., 24 S. D. R. 149; 196 App. Div. 226; 106 S. B. 64; nor a carpenter tearing down a barn upon leased farm land: Millard v. Townsend, 204 App. Div. 132; 118 S. B. 45. Compare notes under "Care of buildings," above, group 2, and "Building care, maintenance and salvage," above, this group.

Canning. Gathering produce grown by a cannery is incidental to canning of it: Clarke v. Sherman, 15 S. D. R. 602; 184 App. Div. 921; 97 S. B. 146.

Carpentry. Regularity and permanency of employment as carpenters, painters, etc., figured in Mulford v. Pettit & Sons, 175 App. Div. 958; 220 N. Y. 540; 87 S. B. 172; Alterman v. Namm & Son, 190 App. Div. 76; 229 N. Y. 640; 97 S. B. 141; compare notes on "Independent Contractors" under § 2, subd. 4, and note on the Bargey, McNally and Dose cases under § 2, subd. 5 above. See carpentry references, 162 S. B. 15, 61, 97, 102, 105; 177 S. B. 295; 188 S. B. 178; 204 S. B. 13, 14.

Excavation. Clearing ground is incidental to excavation: Lemberg v. Fox, 224 App. Div. 801; 161 S. B. 34.

Grave digging. The grave digging must be for the employer's pecuniary gain: Dillon v. Trustees of St. Patrick's Cathedral, 234 N. Y. 225; 118 S. B. 129.

Heating. See note under "Building care" above.

Ice distribution, harvesting, etc. Storage of ice for farm use figured in Mullen v. Little, 186 App. Div. 169; 97 S. B. 149. For ice harvesting as a seasonal occupation, see notes under § 14, below.

Logging and lumbering. Award has been reversed in a case of logging on a farm: Brockett v. Mietz, 184 App. Div. 342; 97 S. B. 148; and in a case of skidding logs on a woodlot: Towers v. Putnam, 234 App. Div. 641; 11 Ind. Bul. 31.

Lumberman cases subject of court opinions are: Claremont v. De Coss, 7 S. D. R. 463; 175 App. Div. 952; 220 N. Y. Rep. 671; 95 S. B. 195; Peake v. Lakin, 9 S. D. R. 220; 176 App. Div. 917; 221 N. Y. Rep. 496; 95 S. B. 195; Sullivan v. Preston, 10 S. D. R. 566; 177 App. Div. 110; 95 S. B. 198; Uhl v. Hartwood Club 9 S. D. R. 360, 2 Bul. 27; 177 App. Div. 41; 221 N. Y. Rep. 588; 87 S. B. 186; Tsangournos v. Smith, 14 S. D. R. 687, 3 Bul. 80; 183 App. Div. 751; 95 S. B. 207; Skeels v. Smith's Hotel Co., 195 App. Div. 39; 114 S. B. 104, 107; Posey v. Moynehan, 195 App. Div. 442; 106 S. B. 85; Fancher v. Boston Excelsior Co., 203 App. Div. 294; 235 N. Y. 272; 118 S. B. 41; Dean v. Johnson, 5 Ind. Bul. 165; 216 App. Div. 773; 149 S. B. 29; Foster v. Fitzpatrick & Weller, 253 App. Div. 854; 204 S. B. 542. These are all subletting cases, except the Uhl, Posey, Fancher and Dean cases. Compare § 56 below. See 162 S. B. 15, 17, 62, 103, 152; Lobdell v. Ervay 262 N. Y. Rep. 529; 185 S. B. 261; Elderkin v. Yates Lumber Co., 228 App. Div. 868; 177 S. B. 38; Cummings v. Bruce & Drake, 231 App. Div. 775; 177 S. B. 29, 30; McAllister v. Cobb, 237 App. Div. 674; 188 S. B. 23.

Milling. Operating a thresher is not milling but may be incidental thereto: Vincent v. Taylor Bros., 180 App. Div. 818; File No. 16862; 185 App. Div. 901; 87 S. B. 80. The Court of Appeals affirmed award to an employee injured while operating a feed and grist mill on a dairy farm: Hamilla v. Gade, 252 App. Div. 712; 278 N. Y. Rep. 502; 204 S. B. 9.

Mining. Compare § 3, subd. 2, par. 18, miners' occupational diseases, below.

Painting. Compare "Lead poisoning," § 3, subd. 2, below. See 162 S. B. 15, 16, 60, 62, 63, 100, 143. A painter by trade, injured while painting a farmer's barn, was denied compensation: McComsey v. Simmons, 7 S. D. R. 433. See also notes under "Carpentry" above.

Pile driving. Driving sheeting for a jetty to protect baths on a water front is pile driving: Mazzarisi v. Ward & Tully, 4 S. D. R. 443; 170 App. Div. 868; 81 S. B. 263.

Plastering. Filling a hole with plaster, incidentally to calcimining, is not plastering: Hungerford v. Bonn, 183 App. Div. 818; 97 S. B. 73.

Plumbing. An employee working both as expert draftsman and steamfitter received compensation for disability incurred while steamfitting, without deduction for wages paid for drafting during disability period: McKay v. Hinchman Co., 10 S. D. R. 636; 178 App. Div. 942; 97 S. B. 74. An employee hurt while installing in his own home a furnace bought from his employer was denied compensation: Koch v. Holland Furnace Co., 227 App. Div. 823; 177 S. B. 94.

Road building. See also "Highways," Group 3, above, and note thereunder.

Roofing. For roofers as independent contractors, see Beach v. Velzy, 238 N. Y. 100; 133 S. B. 44; Ball v. Estate of Bertelle, 201 App. Div. 768; 118 S. B. 38; McNinch v. Regal Lumber Co., 238 App. Div. 751; 12 Ind. Bul. 51; the Appellate Division affirmed award under § 56 to a roofer as an employee: Maltman v. Laurye Homes Corp., 239 App. Div. 869; 12 Ind. Bul. 169. Sheet metal work upon cornices is roofing or plumbing: Rosenthal v. Weinschelblatt, 218 App. Div. 794; 6 Ind. Bul. 59.

Salvaging of buildings. See "Building care, maintenance and salvage," above.

Storage. The amendment by L. 1916, ch. 622, inserting the words "of all kinds and storage for hire," appears to cover private as well as public storage and so to offset Mihm v. Hussey, 169 App. Div. 742; 81 S. B. 135.

Retail storage of coal is covered by amendment of L. 1917, ch. 705, adding the words "coal yards" to gr. 19. See now gr. 14. Otherwise, storage incidental to keeping up a retail stock of any kind is not storage within the meaning of this group: Walsh v. Woolworth Co., 180 App. Div. 120; 87 S. B. 65; Roberto v. Schmadeke, 180 App. Div. 143; 87 S. B. 63; Kronberger v. Harlem Bottling Co., 181 App. Div. 900; 87 S. B. 68; Dugan v. McArdle, 184 App. Div. 570; 225 N. Y. Rep. 668; 97 S. B. 69; Harter v. Andrus, 259 App. Div. 942; 204 S. B. 177.

Street cleaning. Award to a municipal sanitary code investigator was affirmed under this Group: Kelleher v. City of New York, 253 App. Div. 850; 204 S. B. 178.

Subaqueous construction. Compare below, § 3, subd. 2, par. 17, compressed air illness. Tunnel construction underneath the Hudson River is not in admiralty: Sullivan v. Booth & Flinn, 122 Misc. 288; 210 App. Div. 347; 133 S. B. 148, 149.

Tree moving, planting, etc. This item, as part of former gr. 13, was held by a commissioner not to cover the trimming of fruit trees: O'Dell v. Bowman, 19 S. D. R. 523, 4 Bul. 166; 97 S. B. 146.

Tunneling. Compare "Subaqueous construction," immediately above, and "Compressed air illness," § 3, subd. 2, par. 17, below.

Upholstering. Taking up an old carpet and putting down a new one is not upholstering: Strader v. Sterns Bros., 184 App. Div. 700; 97 S. B. 65.

Laws of 1941, ch. 221, effective July 1, 1941, added to the list of hazardous employments of § 3, subdivision 1, the laying of floor coverings (group 5).

Warehousing. In Harter v. Andrus, 259 App. Div. 942; 204 S. B. 177, the Industrial Board found that the storage of grain by the employer who operated a retail feed store was greater in volume and degree than storage for ordinary use and purposes in a retail store. Award to claimant who injured his knee while carrying feed from the feed store to a customer's car, reversed, with statement, "The operation of a retail feed business is not classified as a hazardous employment under the Workmen's Compensation Act. There is no evidence in this record to support a finding that the employer was engaged in the storage business. Whatever storage there may have been was clearly incidental to the retail business."

See also "Storage" above.

Window cleaning. Compare Labor Law provisions regulating window cleaning and prohibiting children therefrom (§ 146, subd. 2, par. h, § 202). The Court of Appeals held a corporation managing a building liable as a third party for breaking of a window cleaner's strap: Kindga v Noyes Co., 260 N. Y. Rep. 521; and the custodian of a New York city school building liable as employer for injury to a window cleaner: Bederman v. McNamara, 268 N. Y. Rep. 510; 185 S. B. 253. The Appellate Division held a window cleaner to be an independent contractor: Crisp v. Glenn, 227 App. Div. 678; 177 S. B. 46, but held other window cleaners to be employees: Schenkler v. Borough Hall Window Cleaning Co., 190 App. Div. 924; 98 S. B. 57; Annis v. Miller Cap Co., 215 App. Div. 731; 149 S. B. 30. It affirmed awards to janitresses and a janitor living on their employers' premises and injured while cleaning the windows of their own living quarters: Poupart v. Myers, 242 App. Div. 720; 13 Ind. Bul. 203; Hanna v. Pierson Co., 194 App. Div. 944; 106 S. B. 152; Kutz v. Richell Realty Co., 245 App. Div. 886; 204 S. B. 260. The Department of Labor held that removing a shade was incidental to cleaning a window: Tracy v. Mertons, 12 S. D. R. 562, 2 Bul. 162.

Wrecking, marine. Award under the New York Workmen's Compensation Law to a laborer who sustained injury while wrecking boats in navigable waters was affirmed: Connelly v. Connelly, 255 App. Div. 909; 204 S. B. 556.

Group 14. Work in:

Abattoirs
Bakeries
Bark mills
Boarding stables
Breweries
Caissons
Clay pits
Coal yards
Compressed air compartments
Dining cars
Distilleries
Express cars
Fish markets
Flax mills
Foundries
[1]Garages
Garbage plants
Gravel pits
Groceries, wholesale
Hotels having [2]four or more workmen or operatives
Junk dealers' places
Knitting factories
Laboratories
Lath mills
Laundries[3]
Life-saving stations
Lime kilns
Livery stables
Lumber yards
Machine shops
Markets, fish, meat, poultry
Meat markets
Packing houses
Paper mills
Parlor cars
Pickle factories
Planing mills
Poultry markets
Printing plants
Pulp mills
Quarries
Rolling mills
Sales stables
Sand pits
Sash and door factories
Saw mills
Sewage disposal plants
Shale pits
Shingle mills
Sleeping cars
Spinning manufactories
Stables, livery, boarding or sales
Storage warehouses
Sugar refineries
Tanneries
Weaving manufactories
Wholesale groceries

[1] Word "garages" substituted for "public garages" by L. 1922, ch. 615.

[2] Words "four or more workmen or operatives" substituted for words "fifty or more rooms" by L. 1922, ch. 615.

[3] Word "power" stricken out by L. 1929, ch. 564.

Bakeries. The Appellate Division held a bakery route man to be an employee: Blum v. Levy & Sons, 228 App. Div. 867; 177 S. B. 35; and affirmed award for death of a bakery supplies agent at the hands of gunmen while attending a bakers' meeting: Selonick v. Lowe Corp., 227 App. Div. 678; 177 S. B. 107.

Breweries. Collecting money from a saloon is incidental to the brewery business: Spang v. Broadway Brewing & Malting Co., 182 App. Div. 443; 87 S. B. 111.

Caissons. Compare "Subaqueous construction" and "Tunneling," Group 13, above, and "Compressed air illness," § 3, subd. 2, par. 17, below.

Compressed air compartments. Compare "Subaqueous construction" and "Tunneling," Group 13, above, and "Compressed air illness," § 3, subd. 2, par. 17, below.

Garages. The Court of Appeals affirmed awards to garage employees hurt while painting and excavating at their employers' home: MacDonald v. Grand Battery & Ignition Service, 254 N. Y. Rep. 605; 177 S. B. 92; Collier v. Dangard, 256 N. Y. Rep. 561; 177 S. B. 93.

Garbage plants. A mere refuse dump is not a garbage disposal plant: Tomassi v. Christensen, 171 App. Div. 284; 81 S. B. 104.

Groceries, wholesale. This covers sale of groceries in bulk to grocery stores and restaurants, though the seller conducts a retail store in connection: Jurgreau v. Scherzer, Case No. 58104; 185 App. Div. 920; 97 S. B. 71.

Hotels having four or more workmen or operatives. The Court of Appeals affirmed award to a hotel cook who lived in the hotel and incurred injury therein while off duty: Underhill v. Kecner, 258 N. Y. Rep. 543; 177 S. B. 87; in earlier cases, the Appellate Division reversed award to a hotel maid who slipped on a bath room floor and broke her leg while getting ready to go on duty: Fraher v. Hotel McAlpin, 31 S. D. R. 158; 210 App. Div. 817; 133 S. B. 66; and award to a maid who quit her employment but returned to collect her pay and injured her ankle upon the hotel steps: Olson v. Hulbert-Sherman Hotel Co., 210 App. Div. 537; 133 S. B. 64; and, in a later case, affirmed denial of award for death of a musician drowned while rowing for recreation in a hotel skiff: Engel v. Diamond, 241 App. Div. 783; 13 Ind. Bul. 83. The Court of Appeals affirmed award for death of a hotel page by accidental explosion of a cartridge: Brozovich v. Hotel Pennsylvania, 259 N. Y. Rep. 514; 177 S. B. 118, 119. The Appellate Division reversed award for death of a hotel package boy while operating an elevator: Laufrouben v. Twelve East Eighty-Sixth St. Corp., 226 App. Div. 708; 177 S. B. 145, 146. See also note under "Laundries" below.

Junk dealers' places. Breaking up a wheel may be incidental to the junk business: Levine v. Golds Sons, 14 S. D. R. 691; 3 Bul. 78. Buying second-hand bottles is not dealing in junk: Kronberger v. Harlem Bottle Co., Case No. 17636; 181 App. Div. 900; 87 S. B. 68. A helper on truck owned by a junk dealer was held to be engaged in the operation of a vehicle: Lisa v. Esposito, 252 App. Div. 907; 204 S. B. 180.

Laboratories. Laboratory work of a public school teacher figured in Beeman v. Board of Education of Penn Yan, 195 App. Div. 357; 231 N. Y. Rep. 624; 106 S. B. 67. This group covers laboratory work performed by a private school teacher: Opinion of Attorney-General, May 7, 1934; also covers diagnostic, as well as manufacturing laboratory work: Ruhl v. Schelberg, 5 Ind. Bul. 55; 215 App. Div. 739; 140 S. B. 69; and laboratory determining moisture content of imported woodpulp: Opinion of Attorney-General, Oct. 28, 1936.

For radium and x-ray injuries in laboratories as occupational diseases see paragraph 20, subdivision 2, of § 3, below.

See also Group 20, below.

Laundries. See hospital laundry case, Connelly v. Samaritan Hospital, 259 N. Y. 137; 177 S. B. 127; and hotel laundry cases: Daly v. Bates & Roberts, 224 N. Y. 126; 97 S. B. 110; Smith v. Surf Apartments, 253 N. Y. Rep. 542; 177 S. B. 169.

Markets, fish, meat, poultry. In connection with the words "meat markets" inserted by L. 1916, ch. 622, compare Kohler v. Frohmann, 167 App. Div. 533; 81 S. B. 394; Newman v. Newman, 169 App. Div. 745; 218 N. Y. 325; 81 S. B. 86; Pietha v. Murdter, 174 App. Div. 764; 87 S. B. 70; and Gibson v. New Crown Market, 208 App. Div. 267; 133 S. B. 72. A counterman in a wholesale meat market was compensated for tuberculosis as an occupational disease: Bishop v. Comer & Pollock, 251 App. Div. 492; 204 S. B. 207. See notes under § 3, subd. 2, par. 28.

Claim of a municipal market inspector who was injured in the course of her employment was disallowed on ground that she was not engaged in a hazardous employment within the purview of the law: Hayes v. City of New York, 256 App. Div. 111; 280 N. Y. Rep. 743; 204 S. B. 178.

Stables. For unwitnessed fatal accidents to stablemen occupying living quarters in stables see Zinkowitz v. Most & Kashman, 214 App. Div. 844; 149 S. B. 43; Kogelets v. National Stables, 240 App. Div. 741; 12 Ind. Bul. 196; 250 App. Div. 803; 16 Ind. Bul. 130; Penn v. Lewis, 259 App. Div. 944; 284 N. Y. Rep. 614; 204 S. B. 76.

Storage warehouses. Compare "Storage" and "Warehousing" under Group 13, above.

Group 15. Employment as a keeper, guard, nurse, [1]interne or orderly in a prison, reformatory, insane asylum or hospital maintained or operated by [2]a municipal corporation or other subdivision [3]of the state, notwithstanding the definitions of the terms "employment," "employer" or "employee" in subdivisions [4]three, four and five of section [5]two of this chapter. [*Former gr.* 44, *added by L.* 1917, *ch.* 705; *renumbered gr.* 15 *and am'd by L.* 1922, *ch.* 615; *am'd by L.* 1924, *ch.* 658; *and L.* 1936, *ch.* 711.]

[1] Word "interne" inserted by L. 1936, ch. 711.
[2] Words "the state or" eliminated by L. 1924, ch. 658.
[3] Words "of the state" substituted for word "thereof" by L. 1924, ch. 658.
[4] Words "three, four and" inserted by L. 1922, ch. 615.
[5] Word "two" substituted for word "three" by L. 1922, ch. 615.
See also group 17, below.

Patrolman. A patrolman detailed to service in a police station is not thereby brought within the coverage of this group: Ryan v. City of N. Y., 18 S. D. R. 600; 189 App. Div. 49; 228 N. Y. 16; 106 S. B. 63.

Internes. Prior to the inclusion of internes under this group, in a case of voluntary insurance by a private hospital the Court of Appeals held that an interne is an employee: Bernstein v. Beth Israel Hospital, 236 N. Y. 268: 133 S. B. 42.

Group 16. [1]Any employment [2]by the state, notwithstanding the definitions of the terms "employment," "employer" or "employee," in subdivisions [3]three, four and five of section [4]two of this chapter. [5]An employee engaged in any employment herein whose wages is paid by a municipal corporation or other subdivision of the state or by an employer other than the state shall be deemed an employee of such municipal corporation or other political subdivision of the state or such employer other than the state for the purposes of this chapter. [*Former gr.* 45, *added by L.* 1918, *ch.* 633; *renumbered gr.* 16 *and am'd by L.* 1922, *ch.* 615; *am'd by L.* 1924, *ch.* 658 *and L.* 1939, *ch.* 732.]

[1] Word "Any" inserted by L. 1924, ch. 658.
[2] Words "as a district forest ranger, observer, chief railroad inspector, game protector, inspector, forester, land appraiser, surveyer, assistant on survey, engineer, or assistant on construction work," eliminated by L. 1924, ch. 658.
[3] Words "three, four and" inserted by L. 1922, ch. 615.
[4] Word "two" substituted for word "three" by L. 1922, ch. 615.
[5] Concluding sentence added by L. 1939, ch. 732.
The provisions of this Group must be read in conjunction with §§ 10 and 30, below.

Bill drafter's memorandum. The following memorandum was appended to Ch. 732, Laws of 1939:

In *Daly* v. *State of New York*, 254 App. Div. 914, affirmed recently in the Court of Appeals, an employee of the Board of Elections, an agency of the City of New York, which hired and paid the employee, was held to be a state employee for compensation purposes because the Board of Elections performs the functions of the state government. In *Cunningham* v. *Department of State*, 255 App. Div. 729, a boxing referee, appointed by the State Athletic Commission to officiate at boxing bouts, who was paid by the Sporting Club, was held to be a state employee because of his being licensed and designated by the Commission. In neither of these cases, other than setting up the requirements of law, does the state exercise control over the employees. The State neither employs the employee, nor pays his wages. This amendment does not affect the right of these employees to compensation but places the burden of payment thereof upon the employer who hires, controls and pays the employee.

STATE EMPLOYEES

The State insures all of its employees in the State Insurance Fund, below, §§ 76-99, the Legislature appropriating the premium annually.

The following were held to be State employees:

Caretakers and others employed by the New York State Department of Public Works under State Boards and Commissions Law, § 55, and Public Works Law, § 12, upon the Delaware river boundary crossing bridges maintained at joint expense of New York and Pennsylvania: Opinion of Attorney-General, February 15, 1935.

Field representatives of the State's Temporary Relief Administration though loaned by private social welfare organization: Opinion of Attorney-General, Report of Industrial Commissioner, 1931, p. 171.

General Sessions court attendant: Malone v. City of New York, 255 App. Div. 743; 257 App. Div. 884; 204 S. B. 180.

Law Revision Commission employees: Opinion of Attorney-General, January 28, 1935.

Liquidation Bureau employees of the Department of Insurance: Opinion of Attorney-General, August 6, 1931.

National Youth Administration. See "Students" below.

New York City Board of Elections custodian: Daly v. Board of Elections of the City of New York, 254 App. Div. 914; 279 N. Y. Rep. 743; 204 S. B. 181.

Non-salaried members of Board of Visitors of the State Agricultural School at Industry, New York: Opinion of Attorney-General, September 8, 1938.

Palisades Interstate Park employees: Opinion of Attorney-General, November 5, 1921; Conservation Law, § 746.

Placement and Unemployment Insurance Division employees in the State Department of Labor: Opinion of Attorney-General, May 2, 1938.

State armory hostlers: Archer v. State of New York, 32 S. D. R. 231.

State Insurance Fund employees: Cahill v. Tremaine, 269 N. Y. Rep. 573; Opinion of Attorney-General, January 15, 1936.

State Teachers' College cafeteria employees: Opinion of Attorney-General, May 1, 1933. See also "Teachers paid by the State" below.

State troopers: Opinion of Attorney-General, September 24, 1935.

Students, etc., working for State or local bodies and paid from Federal funds through the National Youth Administration are employees of such State or local bodies: Opinion of Attorney-General, February 9, 1940.

Surrogate's Court clerk: Kelly v. Commissioner of Records, Surrogate's Court, New York County, 255 App. Div. 743; 256 App. Div. 761; 204 S. B. 187.

Teachers paid by the State: Beck v. N. Y. State Commission for the Blind, 33 S. D. R. 568; 149 S. B. 51; Opinion of Attorney-General, May 9, 1933.

Wrestling referee licensed by State Atheltic Commission and injured presiding at bout: Cunningham v. Department of State, Division of State Athletic Commission, 255 App. Div. 729; 204 S. B. 189.

The following were held not to be State employees:

National guardsmen: Goldstein v. State of New York, 257 App. Div. 897; 281 N. Y. 396; 204 S. B. 29; Schmohl v. State of New York, 141 Misc. 274. National guardsmen receive compensation for accidental injuries under §§ 220 and 223 of the Military Law or under special acts referring their cases to the Court of Claims.

Recording clerk in county Register's office: Miller v. State of New York, 253 App. Div. 182; 279 N. Y. 74; 204 S. B. 181.

Sheriff, deputy: Winkler v. Sheriff of Queens County, 255 App. Div. 908; 256 App. Div. 770; 204 S. B. 186.

"Work Relief" Employees. Proviso inserted in § 10, below, by L. 1934, ch. 769, excluding "work relief" employees from coverage under the Workmen's Compensation Law was stricken out by L. 1941, ch. 444, effective April 15, 1941. L. 1934, ch. 303, effective as of April 1, 1934, had provided a special compensation plan for accidental injuries to such employees (184 S. B. 20, 80,

95). Prior to this 1934 legislation, "work relief" employees were held to be entitled to compensation under this Group 16 or Group 17, below: Opinions of Attorney-General, September 13, 1932, February 16, March 7, October 4, and December 14, 1933.

Inmates of State prisons, hospitals, etc. Annually, special acts of the Legislature confer jurisdiction upon the Court of Claims to hear and determine work accidents to inmates of State prisons, hospitals and reformatories.

Other employees. For accidental drowning of a canal lock operator, a state employee, see Kennealy v. State of New York, 135 Misc. 467; 177 S. B. 54, 252, 264–266; Schwartz v. State of New York, 251 App. Div. 634; 277 N. Y. Rep. 567.

Public employees have procured compensation for accidental injuries by special legislative acts; compare L. 1918, chs. 598, 599, 608, 609, 614. Such acts are constitutional: Munro v. State of New York, 181 App. Div. 30; 223 N. Y. 208; 97 S. B. 19.

State departments or authorities hiring trucks with drivers should require proof that the truck owners have secured compensation insurance for the drivers: Opinion of Attorney-General, February 21, 1934; compare similar duty, § 57, below.

Compare references on state employees in particular and public employees in general, 162 S. B. 270; 177 S. B. 302; 185 S. B. 574, 576; 188 S. B. 183.

Workmen's compensation and pension benefit adjustment. This Group 16 secures compensation to all State employees for accidental disability or death incidental to their employments. Such Group, however, must be read in conjunction with § 30, below, and with State statutes other than the Workmen's Compensation Law that also provide benefits for accidental disability or death, notably the following State retirement laws: New York State Employees' Retirement Law (Civil Service Law, §§ 65, 65-a), State Department of Correction Employees' Retirement Law (Correction Law, § 472), State Hospital Employees' Retirement Law (Mental Hygiene Law, § 174), and the State Police Pension Law [Executive Law, § 99-a; Civil Service Law, § 52, Subd. 1 (c)].

Provision that workmen's compensation shall be offset against any pension benefit for accidental disability or death of State employees is contained in the Civil Service Law, § 67; the Correction Law, § 472, Subd. 4; and the Mental Hygiene Law, § 174-a. Provision that the cost of medical treatment and care of injured employees provided under § 13 of the Workmen's Compensation Law shall not be deducted from pension benefits for accidental disability or death is likewise contained in the above-cited laws.

The pension provided by § 65-a of the Civil Service Law on account of the accidental death of a member of the State Employees' Retirement System is payable from funds wholly provided by the State of New York and any benefits receivable by the beneficiary under the provisions of the Workmen's Compensation Law should be offset against the pension in accordance with § 67 of the Civil Service Law: Opinion of Attorney-General, October 9, 1934.

Payments under the Workmen's Compensation Law are an offset against benefits under the State Employees' Retirement System only where such benefits are payable for accidental disability retirement or accidental death benefit (Civil Service Law, §§ 65, 65-a): Opinion of Attorney-General, May 7, 1935.

For a case in which a self-insuring employer appealed from a schedule award to its employee made by the State Industrial Board for accidental loss of an eye, contending that § 67 of the Civil Service Law prohibited the payment of both superannuation retirement allowance and workmen's compensation benefits, see Dalton v. City of New York, 262 App. Div. 321.

Where a beneficiary in the State Employees' Retirement System elects to pursue an action against a third party rather than a remedy under the Workmen's Compensation Law, there is no authority for offsetting against the retirement benefit an amount equivalent to the amount that would have been paid under the Workmen's Compensation Law had the claim therefor been made and prosecuted: Opinion of Attorney-General, March 31, 1937.

For interpretation of § 67 of the Civil Service Law, as it read prior to amendment of it by L. 1931, ch. 389, and L. 1932, ch. 6, see Segnit & Comr. of Taxation

and Finance v. Westchester County Park Comn., 233 App. Div. 232; 177 S. B. 54, 55; for interpretation of it as it reads subsequent to amendment of it by L. 1932, ch. 6, see Opinions of Attorney-General, May 4, 1932, and May 7, 1935; also Letter of Comptroller to Rating Bureau of Insurance Department, April 16, 1934.

Group 17. Any employment enumerated in the foregoing groups and carried on by [1]a municipal corporation or other subdivision [2]of the state, notwithstanding the definition of the term "employment" in subdivision five of section [3]two of this chapter. [*Former gr.* 43, *added by L.* 1916; *ch.* 622; *renumbered gr.* 17 *and am'd by L.* 1922, *ch.* 615; *am'd by L.* 1924, *ch.* 658.]

[1] Words "the state or" eliminated by L. 1924, ch. 658.

[2] Words "of the state" substituted for word "thereof" by L. 1924, ch. 658.

[3] Word "two" substituted for word "three" by L. 1922, ch. 615. Compare § 2, subds. 3, 5 and §§ 30, 57.

See also group 15, above, and group 19, below. For municipal methods of insuring, see § 50, subds. 3-a and 4, below.

MUNICIPAL EMPLOYEES

While Group 16, above, secures compensation to all state employees for accidental disability or death incidental to their employment, this Group 17 does not secure such compensation to all municipal employees but only to such as are engaged in the employments enumerated in the foregoing sixteen Groups. For instance, it does not cover municipal clerks, teachers, policemen or fire fighters.

However, group 19, below, as amended by L. 1941, ch. 875, provides that any municipal corporation or other political subdivision of the State may bring its employees or officers, elective or appointed or otherwise, not enumerated in § 3, subd. 1, groups 1-17, inclusive, within the coverage of the law by appropriate action of the legislative or governmental body of the municipal corporation or political subdivision.

A sanitary code investigator was held engaged in an enumerated hazardous occupation: Kelleher v. City of New York, 253 App. Div. 850; 204 S. B. 178; but a market inspector was held not engaged in an enumerated hazardous occupation: Hayes v. City of New York, 256 App. Div. 111; 280 N. Y. Rep. 743; 204 S. B. 178.

For court decisions denying workmen's compensation to policemen, see Ryan v. City of N. Y., 18 S. D. R. 600; 189 App. Div. 49; 228 N. Y. 16; 106 S. B. 63; Kahl v. City of N. Y., 19 S. D. R. 512, 4 Bul. 147; 198 App. Div. 30; 118 S. B. 49; to firemen, Krug v. City of N. Y., 24 S. D. R. 149; 196 App. Div. 226; 106 S. B. 64; 118 S. B. 22; to town superintendents of highways, Youngman v. Town of Oneonta, 28 S. D. R. 188; 204 App. Div. 96; 236 N. Y. Rep. 521; 118 S. B. 31; to town welfare officers, Richardson v. Town of Clifton Park, 247 App. Div. 846; 188 S. B. 31; but see Dann v. Town of Veteran, 254 App. Div. 462; 278 N. Y. 461; 204 S. B. 533; Van Buren v. Town of Richmondville, 257 App. Div. 1089; 204 S. B. 513; Clemens v. Town of Osceola, 257 App. Div. 884; 204 S. B. 189.

The Ryan, Kahl, Krug and Youngman decisions, supra, are based upon a distinction between public officers and public employees in precedent cases not involving any question of workmen's compensation. Upon authority of them, the Attorney-General has held that village clerks, treasurers and policemen are not coverable for workmen's compensation, except possibly when the insurance policy waives their status: Opinion of Attorney-General, June 14, 1932; Dann v. Town of Veteran, 254 App. Div. 462; 278 N. Y. 461; 204 S. B. 533 also town supervisors, councilmen, assessors, etc.: Id., July 7, 1936; also deputy sheriffs: Id., July 13, 1935; Winkler v. Sheriff of Queens County, 256 App. Div. 770; 204 S. B. 186. But see group 19, below, as amended by L. 1941, ch. 875, re voluntary coverage. Up-state counties and Richmond may compensate deputy sheriffs for injuries in accordance with § 240-a of the County Law.

For court decisions denying workmen's compensation to teachers paid by municipalities, see Beeman v. Board of Education of Penn Yan, 195 App. Div. 357; affd., 231 N. Y. Rep. 624; 118 S. B. 47; Opinion of Attorney-General, May 9, 1933; but see Maynard v. Board of Education, School District No. 4, Town of Greenburgh, 255 App. Div. 908; 204 S. B. 93, in which an award of compensation was made to a school teacher where the school district had secured workmen's compensation. See also Weir v. Board of Education, School District No. 10, 257 App. Div. 1087; 282 N. Y. Rep. 709; 204 S. B. 121, a case in which the claim of a school teacher was disallowed on ground that the accident did not arise in the course of her employment. New York city teachers using tools or machinery or engaged in laboratory experimentation may elect to come under the Workmen's Compensation Law in accordance with new Group 20, below.

Revision of the Workmen's Compensation Law in 1922 omitted a former Group which covered "all policemen of villages." The court affirmed benefits for death of a village policeman against the insurance carrier of the village in Shererd v. Village of Warsaw, 30 S. D. R. 453; 209 App. Div. 841; 133 S. B. 50, 53. See also Hamilton v. Incorporated Village of Lynbrook, 258 App. Div. 1012; 284 N. Y. Rep. 613; Donnelly v. Town of Smithtown, 260 App. Div. 819.

The court affirmed benefits for death of a city fire chief: Rude v. City of Fulton, 225 App. Div. 840; 177 S. B. 16.

Without regard to the question of pecuniary gain a county is liable for compensation coverage of persons performing work on homes deeded by old age pensioners to the county: Opinion of Attorney-General, May 21, 1937.

A voting machine custodian appointed by the Board of Aldermen and paid by the City of New York was awarded compensation as a state employee: Daly v. Board of Elections of the City of New York, 254 App. Div. 914; 279 N. Y. Rep. 743; 204 S. B. 181.

The Chautauqua institution is not a "municipal corporation": Opinion of Attorney-General, 25 S. D. R. 689, Apr. 16, 1921; 106 S. B. 69.

Town Board member was fatally injured while employed as laborer by the town's highway department. Claim for death benefits was dismissed on ground that decedent's contract of employment was void since under the common law a contract between a municipality and one of its officers is against public policy and illegal: Clarke v. Town of Russia, 257 App. Div. 703; 283 N. Y. 272; 204 S. B. 222.

Group 18, below, was held not applicable to municipal employees: Stoerzer v. City of New York, 267 N. Y. 339; 188 S. B. 36.

Municipal departments or authorities hiring trucks with drivers should require proof that the truck owners have secured compensation insurance for the drivers: Opinion of Attorney-General, February 21, 1934; compare similar duty, § 57, below.

See Group 19, the voluntary coverage group, below, and notes thereunder. Compare references on municipal employees in particular and public employees in general, 162 S. B. 270; 177 S. B. 302; 188 S. B. 182; 204 S. B. 600.

"Work Relief" Employees. Proviso inserted in § 10, below, by L. 1934, ch. 769, excluding "work relief" employees from coverage under the Workmen's Compensation Law was stricken out by L. 1941, ch. 444, effective April 15, 1941. L. 1934, ch. 303, effective as of April 1, 1934, had provided a special compensation plan for accidental injuries to such employees (184 S. B. 20, 80, 95). Prior to this 1934 legislation, "work relief" employees were held to be entitled to compensation under this Group 17 or under Group 16, above: Opinions of Attorney-General, November 6, 1931, June 23, 1932, and August 17, 1932. Re "work test" for tramps see Opinion of Attorney-General, May 9, 1933. A municipal corporation is liable for compensation to its "work relief" employee injured while working on a state project: Resolution of State Industrial Board, December 21, 1933; see also Opinion of Attorney-General, October 4, 1933. For the status of employees of the National Youth Administration, see Opinions of Attorney-General, March 25, 1936, and February 9, 1940.

County relief officials, such as director, senior investigator and accountant, are not "relief case" positions and should be insured by the county: Opinion of

Attorney-General, May 14, 1936. The "work relief" covered by the relief act benefits (chs. 303, 769, L. 1934) was limited to that under State T.E.R.A. supervision; purported continuance of "work relief" by a municipality after termination thereof by the T.E.R.A. is the responsibility of the municipality which is liable for workmen's compensation: Opinion of Attorney-General, February 11, 1937. Or July 1, 1937, the T.E.R.A. was taken over by the reorganized Department of Social Welfare (192 S. B. 25).

Relative to wage basis of compensation of "work relief" employees, see Barlog v. Waters Comrs. of Dunkirk, 239 App. Div. 225; 185 S. B. 214.

Volunteer Firemen. Volunteer firemen have disability and death benefits under § 205 of the General Municipal Law and may by election of their municipalities have supplemental compensation under the Workmen's Compensation Law; see group 19, below, and note thereunder. Municipal pensions not sustained by employee contributions may be applied towards death benefits of the Workmen's Compensation Law: § 30, below.

Section 207-a of the General Municipal Law provides for the payment of salary, medical and hospital expenses of firemen in cities of less than one million population, towns or villages having a paid fire department who sustain injury or are taken sick as a result of the performance of their duties.

Pension Benefit for Accidental Disability or Death of Municipal Employees. Municipal employees who are members of the New York State Employees' Retirement System, or their wives, children and parents, are entitled to compensation for total disability or to benefits for death under § 65 or § 65-a of the Civil Service Law when such total disability or death has been caused by accident; and, according to § 67 of the Civil Service Law as amended by Laws of 1931, ch. 389, and Laws of 1932, ch. 6, compensation or benefits under the Civil Service Law does not preclude award for medical expense under § 13 of the Workmen's Compensation Law if the employee has been covered by it. Moreover, according to § 67, if death benefits under § 65-a of the Civil Service Law are less in aggregate than death benefits under § 16 or § 17 of the Workmen's Compensation Law, claimants, if covered by the latter law, may take under it. For interpretation of § 67, as it read prior to amending of it by L. 1931, ch. 389, see Segnit & Comr. of Taxation & Finance v. Westchester County Park Comn., 233 App. Div. 232; 177 S. B. 54, 55; for interpretation of it as it reads subsequent to amendment of it by L. 1932, ch. 6, see Opinion of Attorney-General, May 4, 1932, and Letter of Comptroller to Insurance Department's Rating Bureau, April 16, 1934.

Accident benefits to New York city employees or their wives, children or parents by reason of membership in the general New York city employees' retirement system are provided by § B3–40.0 and § B3–33.0 of the city's administrative code adopted to harmonize with the new city charter, effective January 1, 1938 (former §§ 1714 and 1718 of the greater New York charter). These benefits are offset by the Workmen's Compensation Law's benefits (§ B3–45.0 of the code, former § 1719 of the charter). These two general systems confer accident benefits upon thousands of city and county employee members of them who are not covered by Group 17.

New York City policemen, firemen and street cleaners are not members of the general city employees' retirement system but have retirement systems of their own, under the city's charter, which include accident benefits. Charters of other cities make similar provision for policemen, firemen, etc.

Section B3–45.0 of the city's code provides that no decision of the State Industrial Board shall bind the medical board of the city's general retirement system or the board of estimate in determining the eligibility of a claimant for accidental disability or accidental death benefit. This offsets the Court of Appeals' decision in Slattery v. Board of Estimate and Apportionment, 271 N. Y 346; 15 Ind. Bul. 284.

Group 18. All other employments, [1]except persons engaged in a [2]teaching or nonmanual capacity in or for a religious, charitable or educational institution, [3]notwithstanding the definition of employment in subdivision five of section two, not hereinbefore enumerated, carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers, [4]domestic servants, [5]other than private or domestic chauffeurs employed as such in cities of two million inhabitants or over, [6]unless the employer has elected to bring such employees under the law by securing compensation in accordance with the terms of section fifty of this chapter [7]and persons engaged in voluntary service not under contract of hire. [8]A minister, priest or rabbi, or a member of a religious order, shall not be deemed to be employed or engaged in employment under the terms of this section. [9]All persons employed, either by direct employment or by contract, in logging or wood cutting operations, conducted by a farmer on his own farm, consisting of felling timber, cutting it into dimension lengths and taking it to market or to a point for shipment or transportation, shall not be deemed to be employed or engaged in employment under the terms of this section, provided not more than four persons are so employed by such farmer at one time, and provided further that this exemption shall not extend to the sawing of such timber or wood into lumber. [10]Recipients of charitable aid from a religious or charitable institution who perform work in or for the institution which is incidental to or in return for the aid conferred, and not under any express contract of hire, shall not be deemed to be employed or engaged in employment under the terms of this section. [*Former gr.* 45, *added by L.* 1918, *ch.* 634; *renumbered gr.* 18 *by L.* 1922, *ch.* 615; *am'd by L.* 1928, *ch.* 755; *L.* 1929, *chs.* 304 *and* 702; *and L.* 1931, *chs.* 385, 510; *the two groups of* 1931 *merged by L.* 1932, *ch.* 200; *am'd by L.* 1936, *ch.* 217; *L.* 1937, *ch.* 251; *L.* 1941, *ch.* 639.]

[1] Words "except persons . . . institution" inserted by L. 1929, ch. 702.

[2] Word "clerical" eliminated by L. 1937, ch. 251.

[3] Words "notwithstanding . . . section two" inserted by L. 1928, ch. 755.

[4] Word "and" eliminated by L. 1929, ch. 304, and L. 1931, ch. 510.

[5] Words "other than . . . or over" inserted by L. 1931, ch. 510.

[6] Words "unless the employer . . . of section fifty of this chapter" inserted by L. 1941, ch. 639.

[7] Words "and persons engaged in voluntary service not under contract of hire" inserted by L. 1929, ch. 304.

[8] Words "A minister . . . this section" inserted by L. 1929, ch. 702.

[9] Words "All persons . . . into lumber" inserted by L. 1931, ch. 385.

[10] Concluding sentence added by L. 1936, ch. 217.

See "Private or domestic chauffeurs," etc., in Group 12, above, as inserted by L. 1931, ch. 510.

ALL OTHER EMPLOYMENTS HAVING FOUR OR MORE WORKMEN OR OPERATIVES

This group is constitutional and, with one broad sweep, brings within the coverage of the Workmen's Compensation Law every employee of every "person, firm or corporation" that engages or employs "four or more workmen or operatives regularly": Ward & Gow v. Krinsky, 23 S. D. R. 80; 193 App. Div. 557; 231 N. Y. Rep. 525; 259 U. S. 503, 118 S. B. 10; Europe v. Addison Amusements, 231 N. Y. 105; 106 S. B. 70; thus, if a dry goods store has one hundred clerks, two elevator operators and two chauffeurs, the presence of the elevator operators and chauffeurs brings the one hundred clerks within the law's coverage. The employees need not be working in close proximity; they may be scattered throughout a city or throughout the State: Ward & Gow v. Krinsky (supra); Ray v. Union News Co., 198 App. Div. 149; 118 S. B. 20. If the employer carries on business in New York, employees hired by him in New York but scattered throughout the United States and even beyond its bounds are covered by the New York compensation law if "four or more workmen or operatives" are numbered among them: § 2, subd. 7, note relative to "Extra-state accidents."

The words "workmen or operatives" apply to laborers, mechanics or artisans but not to clerks or persons in professional work: Opinion of Attorney-General, 16 S. D. R. 346; 3 Bul. 190; 97 S. B. 79; Report of Attorney-General, 1918, p. 144.

"All employees are not workmen or operatives within the meaning of this law": Europe v. Addison Amusements, 231 N. Y. 105; 106 S. B. 70. See also Clark v. Voorhees, 194 App. Div. 13; 106 S. B. 109; and Westbay v. Curtis & Sanger, 24 S. D. R. 408, 6 Bul. 36; 198 App. Div. 25; 232 N. Y. Rep. 555; 118 S. B. 56; Gilmore v. Preferred Accident Ins. Co., 258 App. Div. 832; 283 N. Y. 92; 204 S. B. 191.

Workmen or operatives must be engaged or employed "regularly"; irregular, intermittent and incidental manual labor does not bring employees within coverage: Cohen v. Rosalsky, 230 App. Div. 604; 256 N. Y. Rep. 649; 177 S. B. 56, 57.

The words "all other employments . . . not hereinbefore enumerated" with which this Group 18 begins restrict its coverage to employments not covered by the preceding seventeen groups; for example, it does not cover employment by the State of New York or its political subdivisions because such employment is covered by Groups 15, 16 and 17, preceding: Stoerzer v. City of New York, 267 N. Y. 339; 188 S. B. 36; Opinion of Counsel to the Commission in Maguire v. Dept. of Farms and Markets, Claim No. 592605, Sept. 23, 1920; Opinion of Attorney-General, June 22, 1923 (133 S. B. 51); but does cover employment by the New York State College of Agriculture and similar recipients of state aid because employees of these institutions are not covered by Group 16, not being state employees: Opinion of Attorney-General, Oct. 23, 1928 (Annual Report of Industrial Commissioner, 1928, p. 240). A coal dealer may be covered in general by this Group 18 while the drivers of his vehicles are covered in particular by Groups 7 and 12, above; compare Mulford v. Pettit & Sons, 220 N. Y. 540; 87 S. B. 172.

Amendment of this group by L. 1928, ch. 755, extended its coverage to churches, charitable organizations, hospitals, fair associations, fraternal societies and similar employers not operating for pecuniary gain; but further amendment by L. 1929, ch. 702, narrowed its application to them by excepting ministers, teachers, etc., in their service.

In Brooklyn Children's Aid Society v. Industrial Board, 136 Misc. 379; 177 S. B. 277, the Supreme Court, Kings County, with opinion, held that the inclusion of employers not operating for pecuniary gain within this group to be valid but upon appeal the Appellate Division, Second Department, held that the trial court had been without jurisdiction to entertain the action (231 App. Div. 845; 232 App. Div. 676) and, upon further appeal, the Court of Appeals affirmed the Appellate Division's order (256 N. Y. Rep. 651).

Barbers have been covered by Group 12, above, since July 1, 1922; prior to that date they were held to be covered by Group 18: Lallos v. Hudson Terminal Barber Shop, 22 S. D. R. 426, 5 Bul. 109; reversed on other grounds, 194 App. Div. 943. Group 18 covers turkish bath employees: Englander v. Lustgarten

Baths, 27 S. D. R. 308. For coverage of beauty parlor employees, see Opinion of Attorney-General, September 14, 1936; Miller v. Garford Laboratories, Inc., 172 Misc. 567; 204 S. B. 40; People (Levy) v. Sommerville, 167 Misc. 89; 204 S. B. 175.

Other cases interpret the group relative to a charitable home: Hall v. Salvation Army, 236 App. Div. 199; 177 S. B. 47; 261 N. Y. 110; 12 Ind. Bul. 77; a music company: Hughes v. Waterson, Berlin & Snyder Co., 254 N. Y. Rep. 607; 177 S. B. 59; a nineteen acre city residence place: Adams v. Ross, 230 App. Div. 216; 177 S. B. 26, 27, 58, 135; a retail lumber sales place: Gomph v. Empire Floor & Lumber Corp., 223 App. Div. 803; 161 S. B. 21; a life insurance office: Martin v. Metropolitan Life Ins. Co., 197 App. Div. 382; 118 S. B. 79; Knickman v. Zurich G. A. & L. Ins. Co., 215 App. Div. 56; 149 S. B. 64, 65; a candy and soda water shop: Nastacos v. Orfan, Case No. 1965473; 198 App. Div. 951; 118 S. B. 147; a five and ten cent store: Kaufman v. Hoenig, Case No. 1041620; 198 App. Div. 982; 118 S. B. 60; a delicatessen and lunch room: Jurman v. Hebrew National Sausage Factory, 198 App. Div. 456; 118 S. B. 58; a saloon: Herbold v. Neff, 200 App. Div. 244; 118 S. B. 59; a summer hotel: Lewkowitz v. Cohen, 202 App. Div. 769; 30 S. D. R. 441; 118 S. B. 30; a hotel under the former fifty-room limitation: Goldberg v. Nachmans & Kastanowitz, Case No. 2132436; 206 App. Div. 641; 133 S. B. 38; an adding machine sales office: Weir v. Elliott-Fisher Co., 29 S. D. R. 239; 206 App. Div. 809; 133 S. B. 38; a lacquer selling station: Wisniewski v. Nikolas & Co., 210 App. Div. 805; 133 S. B. 39; a bowling alley: Potter v. Painter, 210 App. Div. 804; 133 S. B. 39; nurseries: O'Hagen v. Brown Bros. Co., 207 App. Div. 879; 133 S. B. 39; Dimisa v. Detmar Nurseries, 231 App. Div. 771; 177 S. B. 27, 28, 135; an electric selling company: Tanski v. International General Electric Co., D. C., No. 14702-A; 213 App. Div. 844; 140 S. B. 35; an advertising service: Jacobs v. Hamilton Service Corp., 32 S. D. R. 345; 140 S. B. 35; a moving picture concern: Madderns v. Fox Film Corp., 29 S. D. R. 419; 205 App. Div. 791; 133 S. B. 160; 237 N. Y. Rep. 614; 7 Ind. Bul. 99; 222 App. Div. 785; a golf club: Meyer v. North Hills Golf Club, 238 App. Div. 752. Concerning coverage by this Group 18 of architects' employees, see Opinion of Attorney-General, August 26, 1935; of labor unions' business agents, Id., November 7, 1935; of professional hockey players, Id., February 6, 1936; of a retail haberdashery store employees, Id., September 14, 1936; of baseball players, Id., May 3, 1937. History of the subject is in 97 S. B. 79, 80; 106 S. B. 70–78; 118 S. B. 9–21, 55–61; 124 S. B. 15; 133 S. B. 38, 39; 140 S. B. 35; 149 S. B. 26; 161 S. B. 21; 177 S. B. 47, 56–59, 134, 277–279; 188 S. B. 36–39.

Group 19. An employer may bring an employment that is not listed in this section within the coverage of this chapter by securing compensation to his employee or employees engaged in such employment in accordance with section fifty of this chapter.[5]

[1]Any municipal corporation or other political subdivision of the state [2]or an incorporated volunteer fire company which renders fire protection service on a contract basis may bring its volunteer firemen within the coverage of this chapter by appropriate action of the legislative or governing body of such municipal corporation or other political subdivision [3]or, in the case of an incorporated volunteer fire company, by resolution of its board of directors or trustees approved at a meeting of the members of such corporation held not less than ten days after notice shall have been given to each member that such resolution would be offered for approval thereat, but the benefits payable under this chapter shall be only so much as the regular benefits hereunder may exceed the benefits payable under section two hundred five of the general municipal law.

[4]Any [6]municipal corporation or other political subdivision of the state may bring its [7]employees or officers, elective or appointed or otherwise, not enumerated in section three, subdivision one, groups one to seventeen inclusive, of this chapter within the coverage of this chapter by appropriate action of the [8]legislative or governmental body of the municipal corporation or political subdivision, notwithstanding the definitions of the terms "employment", "employer" or "employee' in subdivisions three, four and five of section two of this chapter.

Concluding paragraph of Group 19 was reenacted without change by L. 1941, ch. 639, and amended at the same session by ch. 875, without reference to the earlier chapter. Such paragraph, as amended by ch. 875, is set out immediately above and as reenacted by ch. 639, set out immediately below.

[4]Any town of the state may bring its town superintendent of highways within the coverage of this chapter by appropriate action of the town board of the town. [*Concluding paragraphs of former* § 2; *added by L.* 1916, *ch.* 622; *redrafted and numbered group* 19 *by L.* 1922, *ch.* 615; *am'd by L.* 1935, *ch.* 384; *L.* 1939, *ch.* 271; *L.* 1940, *ch.* 225; *L.* 1941, *chs.* 639, 875.]

[1] This paragraph added by L. 1935, ch. 384.

[2] Words "or an . . . contract basis" inserted by L. 1940, ch. 225.

[3] Words "or, in the case . . . approval thereat" inserted by L. 1940, ch. 225.

[4] Concluding paragraph added by L. 1939, ch. 271.

[5] Paragraph eliminated by L. 1941, ch. 639 which read as follows: "Any employee in the service of such employer shall be deemed to have accepted, and shall be subject to the provisions of this chapter, and any act amendatory thereof, if at the time of the accident for which liability is claimed the employee shall not at the time of entering into his contract of hire have given to his employer notice in writing that he elects not to be subject to the provisions of this chapter and filed a copy thereof with the commissioner, or in the event that such contract of hire was made in advance of election of the employer, such employee shall not have given to his employer and filed with the commissioner, within twenty days after such election, notice in writing that he elects not to be subject to such provisions. A minor employee shall be deemed sui juris for the purpose of making such an election."

[6] Words "municipal corporation or other political subdivision" substituted for word "town" by L. 1941, ch. 875.

[7] Words "town superintendent of highways" eliminated and words "employees or . . . seventeen inclusive, of this chapter" inserted by L. 1941, ch. 875.

[8] Words "town board of the town" eliminated and remainder of group added by L. 1941, ch. 875.

Compare § 55, below.

Farm Laborers and Domestic Servants. Farm laborers and domestic servants may be covered by election notwithstanding their exclusion by § 2, subd. 4, above: Becker v. Schul, 5 Ind. Bul. 193, 32 S. D. R. 124; 242 N. Y. Rep. 552; 149 S. B. 23; McPadden v. St. George's Church, 5 Ind. Bul. 193; 242 N. Y. Rep. 551; 149 S. B. 23; Fostner v. Morawitz, 31 S. D. R. 549; 215 App. Div. 176; 140 S. B. 32; Qucck-Berner v. Macy, 240 N. Y. 341; 140 S. B. 30; Caldana v. Buezenberg, 206 App. Div. 183; 133 S. B. 32; Bader v. Reisman, 257 App. Div. 1086; 204 S. B. 194; De Antonis v. Catalano, 256 App. Div. 10; 204 S. B. 499.

When insuring domestic servants, husband and wife will be well advised to procure a policy in both of their names jointly, with coverage including travel

and transportation, and to call attention of the servants and other persons to conspicuous posting of the notices required by § 51, below: Sweeny v. Wait, 261 N. Y. Rep. 690; 262 N. Y. Rep. 566; 185 S. B. 345; Fay v. De Camp, 232 App. Div. 6; 257 N. Y. 407; 177 S. B. 79, 80; Dullum v. Morgan, 236 App. Div. 874; 11 Ind. Bul. 473. Reference to other domestic servant cases are in 162 S. B. 11; 177 S. B. 296; and 188 S. B. 179.

Town Superintendents of Highways. Prior to the enactment of Ch. 271, Laws of 1939, which amended this Group 19, compensation was awarded to town superintendents of highways against the towns' insurance carriers where the latter waived status of the superintendents: Dann v. Town of Veteran, 254 App. Div. 462; 278 N. Y. 461; 204 S. B. 533; Clemens v. Town of Osceola, 257 App. Div. 884; 204 S. B. 189; Van Buren v. Town of Richmondville, 257 App. Div. 1089; 204 S. B. 513.

Volunteer Firemen. In 1895, twenty years before workmen's compensation, the Legislature provided a $500 benefit for accidental death of a volunteer fireman in line of duty. This statute became § 205 of the General Municipal Law. It now provides a $3,000 death benefit to widow or estate, allows additional death benefit of $25 to $50 per month for children under eighteen years of age, covers medical treatment not exceeding $500, and gives compensation for total disability, if permanent, $1,500, if temporary, $20 per week up to maximum $1,000. But if a volunteer fire company is in a city having a firemen's pension fund its members take under such fund in lieu of the above provisions. New §§ 205-a and 206-a, added to the General Municipal Law in 1935, grant to volunteer firemen right of action against a third party and—in New York city—unlimited hospitalization.

In supplement to the volunteer fireman provision of this Group 19, L. 1935, ch. 384 has also amended subds. 4, 5 and 9 of § 2 and §§ 25 and 30 of the Workmen's Compensation Law, which see. Prior to the 1935 legislation, it amended subd. 3-a of § 50 of the Workmen's Compensation Law to permit municipalities to mutually self-insure volunteer firemen within the limits of § 205 of the General Municipal Law. Inference would now be that volunteer firemen of municipalities not taking the action required by this Group 19 are not covered by the Workmen's Compensation Law. The Appellate Division affirmed an award to a volunteer fireman under the Workmen's Compensation Law for accident prior to 1935: Sprague v. Town of Harrison, 230 App. Div. 798; 177 S. B. 56, 112. The chairman of the Industrial Board denied compensation to a volunteer fireman with opinion in Marks v. Town of Irondequoit, 34 S. D. R. 618. The Attorney-General held that fire district commissioners could insure volunteer firemen under the Workmen's Compensation Law: Opinion, February 4, 1935.

Termination of Voluntary Coverage. An employer covered by election under this group may discontinue the coverage of his employees by cancelling or refusing to renew his policy: Letter of Attorney-General, Mar. 15, 1926.

Group 20. In a city having a population of one million or more, teachers, regular or substitute, of shop work, manual training, industrial or trade subjects, mechanic arts, textiles, machine shop assistants, laboratory assistants, and teachers of any subject, trade, or employment requiring, for instruction purposes, use of tools or machinery for which protective, guarding or safety devices are required by the labor law, may elect to receive the benefits prescribed by this chapter provided they are not eligible for retirement under the teachers' retirement system in said city. An election to come within this chapter shall constitute a waiver of any right to receive absence refunds from the board of education of said city. But a teacher shall, if incapacitated to teach by reason of his injuries, be entitled to the refund of his accumulated deductions in the teachers' retirement system or in lieu thereof he may elect to receive an annuity which shall be the actuarial

equivalent of said accumulated deductions. Any election or choice provided for herein may be made for the teacher by one acting in the teacher's behalf if said teacher is incapacitated to act for himself. [*This Group* 20 *added by L.* 1935, *ch.* 327.]

Chapter 327 of the Laws of 1935 adds this Group 20 to § 3 without specifying subd. 1.

2. Occupational diseases. Compensation shall be payable for disabilities sustained or death incurred by an employee resulting from the following occupational diseases:

Column One Description of Diseases	Column two Description of Process
1. Anthrax.	1. Handling of wool, hair, bristles, hides or skins.
2. Lead poisoning or its sequelae.	2. Any process involving the use of [1]or direct contact with lead or its preparations or compounds.

[1] Words "or direct contact with" inserted in this paragraph 2 and in paragraphs 3–6, 8, 9, 12–14, following, by L. 1928, ch. 754.

Insertion of the words "or direct contact with" in column 2 cures defect indicated by Lennon v. Alderton Dock Yard, 32 S. D. R. 402.

For cases involving this paragraph, see Ward v. Standard Oil Co., 256 App. Div. 877; 204 S. B. 195; Fayette v. Brush Studio & Art Shop, 261 App. Div. 1023. Citations to other lead poisoning cases are in 162 S. B. 72. See also 177 S. B. 62–66; 188 S. B. 41–44.

Appeals to the courts in lead poisoning cases have mainly turned upon the meaning of the word "contracted" in § 40, below, which see.

3. Zinc poisoning or its sequelae.	3. Any process involving the use of or direct contact with zinc or its preparations or compounds or alloys.

This paragraph 3 inserted by L. 1922, ch. 615, and following paragraphs renumbered accordingly.

In Hinz v. United Dry Dock, Inc., 250 App. Div. 792; 204 S. B. 195, compensation was denied in case of disability allegedly due to inhalation of particles containing zinc in alloy.

4. Mercury poisoning or its sequelae.	4. Any process involving the use of or direct contact with mercury or its preparations or compounds.

For a case under this paragraph see Andonian v. Premier Metal Etching Co., 219 App. Div. 755; 156 S. B. 88. Inhalation of mercury fumes was compensated as an accident in Derrett v. Williams Gold Refining Co., 222 App. Div. 845; 161 S. B. 18.

5.* Phosphorus poisoning or its sequelae.	5. Any process involving the use of or direct contact with *phosphorous or its preparations or compounds.
6. Arsenic poisoning or its sequelae.	6. Any process involving the use of or direct contact with arsenic or its preparations or compounds.
7. Poisoning by wood alcohol.	7. Any process involving the use of wood alcohol or any preparation containing wood alcohol.

For cases under this paragraph see Beck v. Rosenberg, 228 App. Div. 741; 177 S. B. 66; Kroell v. Press Publishing Co., 235 App. Div. 646; 11 Ind. Bul. 161; Weintraub v. Stein & Koslow, 236 App. Div. 748; 11 Ind. Bul. 337.

8. Poisoning by [1]benzol or nitro-, [2]hydro-, [3]hydroxy- and amido-derivatives of [4]benzene (dinitro-benzol, anilin, and others), or its sequelae.	8. Any process involving the use of or direct contact with [1]benzol or [5]nitro-, [2]hydro-, [3]hydroxy- or [6]amido-derivatives of [4]benzene or its preparations or compounds.

[1] Words "benzol or" inserted by L. 1928, ch. 754.

[2] Word "hydro-" inserted by L. 1922, ch. 615.

[3] Word "hydroxy-" inserted by L. 1929, ch. 298.

[4] Word "benzene" substituted for word "benzine" by L. 1922, ch. 615.

[5] Word "a" eliminated by L. 1929, ch. 298.

[6] Word "amido-derivatives" substituted for word "amido-derivative" by L. 1929, ch. 298.

For cases involving this pargarph see Amsterdam v. Hammer & Bros., 32 S. D. R. 382; 210 App. Div. 816; 133 S. B. 107; Sokol v. Stein Fur Dyeing Co., 216 App. Div. 573; 149 S. B. 70; Kroell v. Press Publishing Co., 235 App. Div. 646; 11 Ind. Bul. 161; Rubin v. New Idea Fur Co., 241 App. Div. 641; 13 Ind. Bul. 31; Levine v. Spector, 241 App. Div. 783; 13 Ind. Bul. 84; Bachmann v. Kutroff, Pichardt & Co., 241 App. Div. 899; 13 Ind. Bul. 146; Cole v. Standard Textile Products Co., 241 App. Div. 902; 13 Ind. Bul. 147; Andress v. Art Metal Construction Co., 31 S. D. R. 611; Haglund v. Bayer Co., 243 App. Div. 840; 188 S. B. 44. Insertion of the words "or direct contact with" cures the defect indicated by the Amsterdam and Sokol decisions. The court affirmed award for aniline poisoning as an accident in Karbowitz v. Weinstein & Son, 5 Ind. Bul. 84; 215 App. Div. 743; 149 S. B. 19, 70.

9. Poisoning by carbon bisulphide or its sequelae, [1]or any sulphide.	9. Any process involving the use of or direct contact with carbon bisulphide or its preparations or compounds, [1]or any sulphide.

[1] Words "or any sulphide" inserted by L. 1929, ch. 298.

For a case involving this paragraph see Wybiernocki v. Natl. Aniline & Chemical Co., 6 Ind. Bul. 27; 217 App. Div. 814; 156 S. B. 86.

* So in original; as a noun, the word is spelled phosphorus; as an adjective, phosphorous.

10. Poisoning by nitrous fumes or its sequelae.	10. Any process in which nitrous fumes are evolved.

The Appellate Division affirmed an award under this paragraph in Grant v. Union Explosives Co., 6 Ind. Bul. 10; 217 App. Div. 808; 156 S. B. 89.

11. Poisoning by nickel carbonyl or its sequelae.	11. Any process in which nickel carbonyl is evolved.
12. Dope poisoning (poisoning by tetrachlor-methane or any substance used as or in conjunction with a solvent for acetate of cellulose [1]or nitro cellulose, *or its sequelae.	12. Any process involving the use of or direct contact with any substance used as or in conjunction with a solvent for acetate of cellulose [1]or nitro cellulose.

[1] Words "or nitro cellulose" inserted by L. 1929, ch. 298.

The courts affirmed an award under this paragraph in Horton v. Demerce & Son, 239 App. Div. 863; 262 N. Y. Rep. 658; 188 S. B. 45.

13. Poisoning by formaldehyde and its preparations.	13. Any process involving the use of or direct contact with formaldehyde and its preparations.

This paragraph 13 inserted by L. 1922, ch. 615, and following paragraphs renumbered accordingly. Former paragraph relative to African boxwood poisoning stricken out by L. 1922, ch. 615. The Appellate Division affirmed award for poisoning by formaldehyde fumigation: Schoeberl v. Pfizer & Co., 240 App. Div. 794; 12 Ind. Bul. 242.

14. Chrome ulceration or its sequelae [1]or chrome poisoning.	14. Any process involving the use of or direct contact with chromic acid or [2]bychromate of ammonium, potassium or sodium, or their preparations.

[1] Words "or chrome poisoning" inserted by L. 1929, ch. 298.

[2] Spelling "bychromate" substituted for spelling "bichromate" by L. 1929, ch. 298.

For cases under this paragraph 14 see Repka v. Fedders Mfg. Co., 239 App. Div. 271; 264 N. Y. Rep. 538; 188 S. B. 107; and Litzel v. Lutz & Sheinkman, 33 S. D. R. 143.

15. Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye, due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound, product or residue of any of these substances.	15. Handling or use of tar, pitch, bitumen, mineral oil, or paraffin or any compound, product or residue of any of these substances.

For an award for dermatitis due to contact with a solution of asphaltum and naphtha, see Wood v. Price Fire and Waterproofing Co., 31 S. D. R. 601.

* So in original; no parenthesis. See L. 1922, ch. 615, § 3, subd. 2, par. 12.

16. Glanders.	16. Care or handling of any equine animal or the carcass of any such animal.
17. Compressed air illness or its sequelae.	17. Any process carried on in compressed air.

For a case involving this paragraph see Bonner v. McGovern, 230 App. Div. 530; 177 S. B. 67.

18. Miners' diseases, including only cellulitis, bursitis, ankylostomiasis, tenosynovitis and nystagmus.	18. Any process involving mining.

This paragraph 18 is a combination by L. 1922, ch. 615, of former paragraphs 17–22, without substantive change.

19. Cataract in glassworkers.	19. Processes in the manufacture of glass involving exposure to the glare of molten glass.

This paragraph, originally 23, renumbered 19 by L. 1922, ch. 615.

The Appellate Division affirmed award for glare of glass in plastic finishing process: Barth v. Binghamton Glass Co., 221 App. Div. 811; 156 S. B. 87.

20. Radium poisoning or disability due to radio-active properties of substances or to Roentgen rays (X-rays).	20. Any process involving the use of or direct contact with radium or radio-active substance or the use of or direct exposure to Roentgen rays (X-rays).

This paragraph 20, effective October 1, 1930, substituted by L. 1930, ch. 60, for paragraph 20 on the same subject inserted by L. 1929, ch. 64, and effective March 6, 1929. L. 1929, ch. 298, signed April 5 and effective from October 1, 1929, until October 1, 1930, restates subd. 2 of § 3 in entirety but does not include the single paragraph 20 inserted by Chapter 64.

21. Methyl chloride poisoning.	21. Any process involving the use of or direct contact with methyl chloride or its preparations or compounds.

This paragraph 21, inserted by L. 1929, ch. 298, as number 24, has been renumbered 21 by L. 1930, ch. 60.

22. Carbon monoxide poisoning.	22. Any process involving direct exposure to carbon monoxide in buildings, sheds or enclosed places.

This paragraph 22, inserted by L. 1929, ch. 298, as number 25, has been renumbered 22 by L. 1930, ch. 60.

Mechanic who tested a large number of automobile motors each day in an illy ventilated room became blind as a result of optic neuritis. Industrial Board's findings that the blindness resulted from exposure to toxic amounts of carbon monoxide gas emanating from running motors and that claimant's condition was an occupational disease covered by this paragraph were affirmed. Rosky v. Cadillac Motor Car Co., 259 App. Div. 772; 204 S. B. 196.

The courts affirmed death benefits for carbon monoxide poisoning as an accident, not an occupational disease, death occurring more than two years after the accident, in Reichard v. Franklin Mfg. Co., 215 App. Div. 851; 223 App. Div. 797; 156 S. B. 19; 249 N. Y. Rep. 525; 161 S. B. 17. For numerous similar carbon monoxide accident cases see Special Bulletins, under title "Poisonous fumes or gases," see also "Lungs, etc.," above, page 31.

23. Poisoning by sulphuric, hydrochloric or hydro-fluoric acid.	23. Any process involving the use of or direct contact with sulphuric, hydrochloric or hydrofluoric acids or their fumes.

This paragraph 23, inserted by L. 1929, ch. 298, as number 26, has been renumbered 23 by L. 1930, ch. 60.

Employee who sprinkled metal castings with muriatic acid claimed that the vapor affected him, resulting in anemia from hydrochloric acid poisoning. Industrial Board's finding that the substance to which said employee was exposed was not a competent producing cause of his disability, upheld. Rizzo v. Lisk Mfg. Co., 256 App. Div. 867; 204 S. B. 196.

24. Respiratory, gastro-intestinal or physiological nerve and eye disorders due to contact with petroleum products and their fumes.	24. Any process involving the use of or direct contact with petroleum or petroleum products and their fumes.

This paragraph 24, inserted by L. 1929, ch. 298, as number 27, has been renumbered 24 by L. 1930, ch. 60.

25. Disability arising from blisters or abrasions.	25. Any process involving continuous friction, rubbing or vibration causing blisters or abrasions.

This paragraph 25 inserted by L. 1930, ch. 60.

Rubbing of a foot and shoe, causing a blister, is not a "process" within the meaning of this paragraph: Nielsen v. Fireman's Fund Indemnity Co., 239 App. Div. 239; 188 S. B. 40.

26. Disability arising from bursitis or synovitis.	26. Any process involving continuous rubbing, pressure or vibration of the parts affected.

This paragraph 26 inserted by L. 1930, ch. 60.

27. Dermatitis (venenata).	27. Any process involving the use of or direct contact with acids, alkalies, acids or [1]oil, [2]or with brick, cement, lime, concrete or mortar capable of causing dermatitis (venenata).

[1] Word "oil" substituted for word "oils" by L. 1934, ch. 743.

[2] Words "or with . . . or mortar" inserted by L. 1934, ch. 743.

This paragraph 27 inserted by L. 1930, ch. 60.

Cook in the employ of a caterer who suffered dermatitis of both hands alleged that it was the result of her work which required her to immerse her hands in vats containing hot salt water and poultry. Finding of Industrial Board that the dermatitis suffered by said cook was not contracted as a result of her contact with oils, acids or alkalies capable of causing dermatitis, upheld, with statement that, "There is a total failure to connect the claimant's claim with her occupation under any provision of the Workmen's Compensation Law." Kluger v. Celian Mansion, 262 App. Div. 784.

In cases prior to enactment of this paragraph dermatitis has been compensated as a result of accident. The courts affirmed awards for dermatitis upon entrance of fur dyes into accident wounds: Hechtenthal v. Eisenberg & Halberstadt, 256 N. Y. Rep. 566; 177 S. B. 179; Karbowitz v. Weinstein & Son, 215 App. Div. 753; 149 S. B. 70. See also Wright v. Used Car Exchange, 221 App. Div. 154; 156 S. B. 16; Noonan v. Paramount Broadway Corp., 235 App. Div. 646; 11 Ind. Bul. 161; Weintraub v. Stein & Koslow, 236 App. Div. 748; 11 Ind. Bul. 337; Wyld v. Autocar Sales & Service Corp., 239 App. Div. 863; 12 Ind. Bul. 139; Levine v. Spector, 241 App. Div. 783; 13 Ind. Bul. 84; Wood v. Price Fire & Waterproofing Co., 31 S. D. R. 601.

28. Any and all occupational diseases.

28. Any and all employments enumerated in subdivision one of section three of this chapter.

Nothing in [1]paragraph twenty-eight of this subdivision shall be construed to apply to any case of occupational disease in which the last injurious exposure to the hazards of the disease occurred prior to September first, nineteen hundred thirty-five; [2]nor to any disability or death due to any disease described, in article four-a of this chapter.

[1] Word "paragraph" substituted for word "group" by L. 1936, ch. 887.
[2] Remainder of sentence added by L. 1936, ch. 887.
This Paragraph 28 inserted by L. 1935, ch. 254, effective September 1, 1935.
Compare Article 4-A, below, on silicosis and other dust diseases.

ANY AND ALL OCCUPATIONAL DISEASES

Arthritis. Traumatic arthritis of the wrist suffered by a presser who used a twelve pound iron, traumatization being caused by the repeated pressure involved was held compensable under this paragraph. Award based on proportionate loss of use of the hand was affirmed. Fleisher v. K. & M. Sportswear, Inc., 258 App. Div. 833; 204 S. B. 197.

Asthma. Bronchial asthma suffered by an automobile spray painter was held compensable under this paragraph: Koprda v. Cadillac Motor Car Division, 258 App. Div. 765; 204 S. B. 197.

Bell's palsy. Chauffeur while driving open motor truck in the course of his employment suffered facial paralysis. On the occasion in question the temperature ranged from forty-four to forty-nine degrees. Award made to the chauffeur for occupational disease upon finding that the condition was caused by his exposure to draught, cold and wind necessitated by his employment, affirmed. Nayor v. Harwick Trucking Corp., 257 App. Div. 1089; 283 N. Y. 62; 204 S. B. 198.

Bronchitis. Bronchitis complicated with asthma contracted by tunnel worker was held compensable under this paragraph: Rhodier v. Frazier-Davis Construction Co., 256 App. Div. 863; 204 S. B. 199.

Cellulitis. Dancing instructress developed a callous formation on the heel or her left foot due to the continuous friction of her shoe against the heel. An ulcer formed beneath the callous and a staphylococcus albus infection followed, causing disability. Finding of Industrial Board that the disability was the result of an occupational disease was affirmed. Hussey v. Murray, 261 App. Div. 1025.

Dupuytren's contraction. Dupuytren's contraction sustained by a marble polisher required to tighten and loosen clamp was held compensable under this

paragragh: Soukup v. Friedman Marble & Slate Works, 255 App Div. 249; 204 S. B. 199. See also Jodlowski v. Empire Milk Trucking Corp., 261 App. Div. 1030.

Hernia. Hernia suffered by a glass gatherer due to the constant twisting and straining of his body in the course of his employment was held compensable under this paragraph: Foster v. Gillinder Bros., 252 App. Div. 903; 278 N. Y. 348; 204 S. B. 201. See also Bettcher v. Du Pont de Nemours & Co., 255 App. Div. 734; 204 S. B. 202.

Lymphangitis. Porter developed patellar abscess and lymphangitis as result of pressing his knee against a mop wringer repeatedly in the course of his work. Award affirmed. Martin v. Shattuck Co., 255 App. Div. 739; 204 S. B. 202.

Pneumonia. Truck driver who was required to lie on drafty floor of garage while working on a car contracted pneumonia. Award affirmed. Robbins v. Enterprise Oil Co., Inc., 252 App. Div. 904; 278 N. Y. Rep. 611; 204 S. B. 45. See also Wolfe v. Brohman, 260 App. Div. 816; 285 N. Y. Rep. ——.

Rash. Rash on legs suffered by a ticket seller from exposure to heater was held not an occupational disease; fall with resultant injury while on way to the doctor for treatment of said rash at the direction of the employer was held compensable as an accidental injury: Goldberg v. 954 Marcy Corp., 251 App. Div. 904; 276 N. Y. 313; 204 S. B. 202.

Scarlet fever. Scarlet fever contracted by a student nurse while assigned to a hospital for contagious diseases was held compensable under this paragraph: Proctor v. Willard Parker Hospital and Genesee Hospital, ex rel., 256 App. Div. 1018; 204 S. B. 3.

Tuberculosis. Tuberculosis suffered by a student nurse engaged in general ward duty was held not compensable: Miller v. City of New York, 257 App. Div. 1092; 282 N. Y. Rep. 707; 204 S. B. 206. But see Vanore v. Mary Immaculate Hospital, 260 App. Div. 820; 285 N. Y. Rep. ——; Moore v. Colonial Sand & Stone Co., Inc., 261 App. Div. 857.

Meat market clerk who was required to enter a cold storage room from ten to thirty times a day contracted pulmonary tuberculosis. Industrial Board's disallowance of claim for compensation for disability due to the tuberculosis as an occupational disease was reversed and the matter remitted to the Board. Bishop v. Comer & Pollack, Inc., 251 App. Div. 492; 204 S. B. 207. For tuberculosis superimposed upon a pulmonary fibrosis suffered by a moulder who was exposed to free silica, see Huffman v. Cast Traffic Sign Corp., 258 App. Div. 1013; 204 S. B. 207.

General Notes to § 3, Subd. 2.

[*Former § 49-a added by L. 1920, ch. 538; renumbered § 3, subd. 2 and am'd by L. 1922, ch. 615; am'd by L. 1928, ch. 754; L. 1929, chs. 64, 298; L. 1930, ch. 60; L. 1934, ch. 743; L. 1935, ch. 254; and L. 1936, ch. 887.*]

For further provisions governing occupational diseases, see §§ 37-48, and 65-72, below.

For detailed exposition of the first nineteen of the above paragraphs by a chemical engineer, see article on "Workmen's Compensation Chemistry" in the New York Department of Labor's Industrial Hygiene Bulletin, April, 1928; for statistics of New York occupational disease cases, Special Bulletins, Nos. 126, 142, 152, 164, 176, 182, 191, and 196; also Industrial Bulletin Indexes.

The introductory paragraph of former § 49-a read: "Schedule of occupational diseases.—For the purposes of this chapter only the diseases enumerated in column one, following, shall be deemed to be *occupational* diseases":

Injury by any one of a number of the deleterious substances listed under this Subdivision 2 may be so sudden, unexpected, and overwhelming as to constitute accident or may be due to entrance of them into accidental wounds, and so may be compensable under subd. 7 of § 2, above.

The general coverage of occupational diseases by new Paragraph 28 of this subd. 2 bars action of an employee against his employer for injury by such diseases because of the employer's negligence, except where the employment is not covered by subd. 1 of this § 3: Repka v. Fedders Mfg. Co., 239 App. Div. 271; 264 N. Y. Rep. 538; 188 S. B. 107; Barrencotto v. Cocker Saw Co., 266 N. Y. 139; 188 S. B. 110.

ARTICLE 2

Compensation

Section 10. Liability for compensation.
11. Alternative remedy.
12. Compensation not allowed for first seven days.
13. Treatment and care of injured employees.
13-a. Selection of authorized physician by employee.
13-b. Authorization of physicians by commissioner.
13-c. Licensing of compensation medical bureaus and laboratories.
13-d. Removal of physicians from lists of those authorized to render medical care.
13-e. Revocation of licenses to compensation medical bureaus.
13-f. Payment of medical fees.
13-g. Payment of bills for medical care.
13-h. Medical treatment of public hospitals.
13-i. Solicitation prohibited.
13-j. Medical or surgical treatment by insurance carriers and employers.
14. Weekly wages basis of compensation.
14-a. Double compensation and death benefits for minors illegally employed.
15. Schedule in case of disability.
16. Death benefits.
17. Aliens.
18. Notice of injury or death.
19. Physical examination.
19-a. [Department physicians not to accept fees from carriers.]
19-b. Treatment by physicians in employ of department.
20. Determination of claims for compensation.
21. Presumptions.
22. Modification of award.
23. Appeals.
24. Costs and fees.
24-a. Representation before the industrial board.
25. Compensation, how payable.
25-a. Procedure and payment of compensation in certain claims.
25-b. Awards to non-residents: non-resident compensation fund.
26. Enforcement of payment in default
27. Depositing future payments.
28. Limitation of right to compensation.
29. Subrogation to remedies of employee.
30. Revenues or benefits from other sources not to affect compensation.
31. Agreement for contribution by employee void.
32. Waiver agreements void.
33. Assignments; exceptions.
34. Preferences.

§ 10. **Liability for compensation.** Every employer subject to this chapter shall in accordance with this chapter, [1]except as otherwise provided in section twenty-five-a hereof, [2]secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury, except that there shall be no liability for compensation under this chapter when the injury has been solely occasioned by intoxication of the injured employee while on duty or by wilful intention of the injured employee to bring about the injury or death of himself or another.[3] [*As am'd by L.* 1922, *ch.* 615; *L.* 1933, *ch.* 384; *L.* 1934, *ch.* 769; *L.* 1941, *ch.* 444.]

[1] Words "except as otherwise provided in section twenty-five-a hereof" inserted by L. 1933, ch. 384.

[2] This § 10 reworded by L. 1922, ch. 615, without substantive change except insertion of words "secure compensation to his employees and".

[3] Concluding paragraph, added by L. 1934, ch. 769, stricken out by L. 1941, ch. 444. It read as follows: "The provisions of this chapter shall not apply to persons receiving 'work relief' and employed on work relief projects under the provisions of chapter seven hundred ninety-eight of the laws of nineteen hundred thirty-one as amended, and the definition of the word 'employee' as herein defined shall not include persons receiving 'work relief' and employed on work relief projects under the provisions of chapter seven hundred ninety-eight of the laws of nineteen hundred thirty-one as amended."

EMPLOYEE'S FAULT AS BAR TO COMPENSATION

An injury does not "arise out of and in the course of the employment," when at the time he incurs it the employee is doing something not incidental to his employment; cases of "incidentalness" and "non-incidentalness" are presented above, pages 35, 50.

In addition to doing something not incidental to his work, conduct of the employee as a bar to compensation has four aspects: (1) wilful intention to injure self or another; (2) intoxication; (3) violation of the employer's rules or orders; (4) violation of law. For references covering each of these four aspects see 162 S. B. 68–71. See also 177 S. B. 137–50; 185 S. B. 112, 478; 188 S. B. 22, 46–92; 204 S. B. 215–225.

Intention to injure. Suicide induced by insanity is compensable: Delinousha v. Natl. Biscuit Co., 248 N. Y. 93; 156 S. B. 76; Stapleton v. Keenan, 265 N. Y. Rep. 528; 13 Ind. Bul. 284; Konieczny v. Kresse Co., 234 App. Div. 517; 177 S. B. 137. See also title "Suicide" in indexes, 162 S. B. 75; 177 S. B. 303; 185 S. B. 576; 188 S. B. 184; 204 S. B. 370–374. The Court of Appeals affirmed award for fatal exposure to cold due to accidental destruction of mental faculties: Malgieri v. General Electric Co., 232 App. Div. 389; 177 S. B. 159. Cases of wilful intention to injure another are cited under "Assault" above, pages 35, 50.

Intoxication. The courts, with opinions, reversed awards to the widow and children of employees whose accidental deaths were alleged to have been caused by intoxication: Shearer v. Niagara Falls Power Co., 31 S. D. R. 566; 242 N. Y. 70; 140 S. B. 71; 217 App. Div. 12; 245 N. Y. Rep. 199; 156 S. B. 79; Parrish v. Premier Cabinet Corp., 256 N. Y. Rep. 575; 177 S. B. 138, 139; Whalen v. Stanwood Towing Co., 17 S. D. R. 626; 186 App. Div. 190; 95 S. B. 350; and Pope v. Merritt & Chapman D. & W. Co., 10 S. D. R. 587; 177 App. Div. 69; 87 S. B. 124; the Appellate Division reversed award to a salesman on ground of intoxication: Brynildsen v. Mount Vernon Novelty Curtain Co., 239 App. Div. 566; 185 S. B. 483; see also Pisko v. Mintz, 262 N. Y. 176; 188 S. B. 60; Ruppert v. Plattdeutsche Volksfest Verein, 263 N. Y. Rep. 338; 188 S. B. 68. The Appellate Division reversed benefits where autopsy showed four plus and two plus alcohol in the employee's blood: Doris v. National Biscuit Co., Case No. 2329855; 214 App. Div. 827; 140 S. B. 72; Fagan v. Simonsen, D. C., No. 2327793; 215 App. Div. 849; 149 S. B. 62; but compare McMahon v. Mack, 220 App. Div. 375; 156 S. B. 79; Kogelets v. National Stables, 240 App. Div. 741; 12 Ind. Bul. 196; 250 App. Div. 803; 16 Ind. Bul. 130. The Department denied benefits to the widow and children of an employee who drank himself to death after his accident: McGurgan v. Burns Bros., 19 S. D. R. 434, 4 Bul. 91. Cases of awards where the injured employee had been drinking are: Cassidy v. 143 West 49th St. Construction Corp., 256 N. Y. Rep. 576; 177 S. B. 140; Westerman v. Equipment & Supply Co., 252 N. Y. Rep. 515; 177 S. B. 139; Carroll v. Knickerbocker Ice Co., 218 N. Y. 435; 81 S. B. 116, 367, 381; Atkins v. Joelson Enterprise, 258 N. Y. Rep. 538; 177 S. B. 140; Callow v. Feinberg, 232 App. Div. 860; 177 S. B. 143; Smith v. Wright Co., 232 App. Div. 343; 177 S. B. 141; Johnson v. Ulysses Apartments, 232 App. Div. 393; 177 S. B. 147; Niebuhr v. Moon Over Mulberry Street, Inc., 250 App. Div. 814; 16 Ind. Bul. 166; Kiernan

v. Friestedt Underpinning Co., 5 S. D. R. 390; 171 App. Div. 539; 81 S. B. 195; Richards v. N. Y. Air Brake Co., 190 App. Div. 78; 97 S. B. 153; Haworth v. Brown, 20 S. D. R. 389, 4 Bul. 170; 198 App. Div. 960; 97 S. B. 154. See also 204 S. B. 215–219.

Violation of Rules or Orders. The employee's method and means of doing his work, however risky or careless, do not debar compensation: Ross v. Genesee Reduction Co., 180 App. Div. 846; 87 S. B. 196.

The courts distinguish injury at assigned work done in a manner forbidden from injury at work absolutely forbidden by the employer: Fronce v. Prosperity Co., 255 N. Y. Rep. 613; 256 N. Y. Rep. 565; 177 S. B. 146; Brenchley v. International Heater Co., 254 N. Y. Rep. 536; 177 S. B. 146; Hyatt v. U. S. Rubber Reclaiming Co., 230 App. Div. 743; 256 N. Y. Rep. 571; 177 S. B. 145; Erdberg v. United Textile Print Works, 216 App. Div. 574; 149 S. B. 65; Macechko v. Bowen Mfg. Co., 13 S. D. R. 505; 179 App. Div. 573; 87 S. B. 205; Wujtowicz v. American Radiator Co., 226 App. Div. 836; 177 S. B. 149; Leahy v. Interborough R. T. Co., 226 App. Div. 837; 177 S. B. 148; Weatherwax v. Saratoga Horse-breeding Association, 240 App. Div. 926; 12 Ind. Bul. 309; Chila v. N. Y. Central R. R. Co., 275 N. Y. Rep. 585; 204 S. B. 219. See also 204 S. B. 219–222.

Non-enforcement of a rule or order abrogates it: Etherton v. Johnson Knitting Mills Co., 184 App. Div. 820; 97 S. B. 156; quasi acquiescence binds the employer: Smith v. Bartle Mfg. Corp., 19 S. D. R. 458; 4 Bul. 143; 189 App. Div. 426; 228 N. Y. Rep. 564; 97 S. B. 156; 106 S. B. 171. The court affirmed death benefits in a case of violating rules to save another's life: Brown v. Vosburg & Son, 5 Ind. Bul. 257; 217 App. Div. 706; 149 S. B. 23, 67.

Injury in an employment or business absolutely outlawed is not compensable but injury in a legitimate employment to an employee to whom employment in it is forbidden because of age, sex or other condition or to an employee who has obtained employment in it in violation of law is compensable; employees of employers violating the prohibition laws, bootleggers and others, have been denied compensation: Swihura v. Horowitz, 215 App. Div. 740; 242 N. Y. Rep. 523; 149 S. B. 67; Herbold v. Neff, 200 App. Div. 244; 118 S. B. 59; but a child whose employment violates the Labor Law is entitled to compensation: Noreen v. Vogel Bros., 231 N. Y. 317; 106 S. B. 173; Ide v. Faul & Timmins, 179 App. Div. 567; 156 S. B. 85; also an employee obtaining employment by false pretences in violation of the Penal Law: Kenny v. Union Ry. Co., 166 App. Div. 497; 81 S. B. 256. See § 14-a, below.

A Town Board member was fatally injured while employed as laborer by the town's highway department. Claim for death benefits was dismissed on ground that his contract of employment was void since under the common law a contract between a municipality and one of its officers is against public policy and illegal. Clarke v. Town of Russia, 257 App. Div. 703; 283 N. Y. 272; 204 S. B. 222.

Illegal entrance into the country is not a bar to compensation: Opinion of Attorney-General, November 8, 1937.

COMPENSATION OF INJURED EMPLOYEES DURING IMPRISONMENT.

Disabled employees have been denied compensation while in prison: Massotti v. Newburgh Shipyards, Case No. 14734-A; 210 App. Div. 538, 803; 149 S. B. 204; Chlemens v. Turner & Blanchard, 5 Bul. 106; 217 App. Div. 806; 6 Ind. Bul. 9; but a widow has received benefits while confined as a vagrant: Chase v. Ulster & Delaware R. R. Co., 5 Ind. Bul. 166, 33 S. D. R. 587; 215 App. Div. 581; 149 S. B. 179. Compensation has been paid to the committees of claimants sent to insane asylums.

Laborer suffered serious head injuries in 1930 as a result of industrial accident. While still being paid compensation in 1935 he was incarcerated on charge of rape in second degree. He plead guilty but before imposition of sentence was found to be insane by a Lunacy Commission and committed to Matteawan State Hospital. Award to committee during the claimant's confinement in Matteawan sustained in view of the fact that no judgment had been pronounced against him and he was, therefore, not a convicted felon. Dutton v. Clancy Carting & Storage Co., 258 App. Div. 837; 204 S. B. 224.

GENERAL NOTES.

For liability of employer when insurance carrier becomes insolvent, see §§ 53, 106–109-j; for deposit or other security from employer when carrier questions policy coverage, § 54-a below.

Denial of compensation because there has been no accident does not preclude action for negligence: Naud v. King Sewing Machine Co., 95 Misc. 676; 178 App. Div. 31; 223 N. Y. Rep. 567; 95 S. B. 382, 383; List v. Eastman Kodak Co., 236 App. Div. 820; 188 S. B. 107.

Payment "without regard to fault" has been upheld by the Supreme Court of the United States in New York Central R. R. Co. v. White, 243 U. S. 188; 87 S. B. 11.

The burden of proving that an accident has been due to intoxication or willful intention to injure rests upon the employer: § 21, subds. 3, 4.

An employer otherwise subject to this chapter is not subject to it when his employee is injured in interstate railroading or in admiralty jurisdiction, pages 7-9, above.

Reckless conduct in line of work or incidentally thereto does not forfeit compensation for resultant injury: N. Y. Central R. R. Co. v. White, 243 U. S. 188; 97 S. B. 151; Moore v. Lehigh Valley R. R. Co., 169 App. Div. 177; 217 N. Y. Rep. 627; 81 S. B. 199; Cleveland v. Rice, 209 App. Div. 257; 239 N. Y. Rep. 530; 133 S. B. 87; Corrina v. De Barbieri, 247 N. Y. 357; 156 S. B. 69; Emerick v. Dale's Motor Truck Service, 239 App. Div. 231; 264 N. Y. Rep. 524; 188 S. B. 87; Moscon v. Thomford, 260 N. Y. Rep. 578; 188 S. B. 87.

Recalcitrance of injured employees relative to medical treatment and care is noticed in general notes under §§ 13–13-j, below, page 118.

Compensation includes funeral expenses; also medical expenses incurred by the injured employee: § 2, subd. 6, above, and note thereunder.

§ 11. **Alternative remedy.** The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. [*As am'd by L.* 1914, *ch.* 316; *and L.* 1916, *ch.* 622.]

EXCLUSIVENESS OF WORKMEN'S COMPENSATION LAW.

The exclusiveness of the liability prescribed by § 10 has been upheld by the Court of Appeals in Shanahan v. Monarch Engineering Co., 219 N. Y. 469; 81 S. B. 321, in which case the Compensation Law was held to be a bar to an action under § 1902 of the Code of Civil Procedure (now Decedent Estate Law, § 130); also in Bodie v. N. Y. & Queens Electric Light & Power Co., 240 App.

Div. 856; 264 N. Y. Rep. 556; 188 S. B. 106; Repka v. Fedders Mfg. Co., 239 App. Div. 271; 264 N. Y. Rep. 538; 188 S. B. 107; and Graf v. Mazzella, 240 App. Div. 974; 264 N. Y. Rep. 581; 188 S. B. 113.

For effect of failure by the employer to post notices of insurance in accordance with § 51, below, see Sweeny v. Wait, 261 N. Y. Rep. 690; 262 N. Y. Rep. 566; 188 S. B. 113; De Antonis v. Catalano, 256 App. Div. 10; 204 S. B. 225.

Insofar as the Legislature has not applied § 18 of the Constitution of New York, page 11, above, an injured employee still has right of action against his employer for negligence: Barrencotto v. Cocker Saw Co., 266 N. Y. 139; 188 S. B. 110. For general review of the subject see 177 S. B. 187–194; for references, see title "Exclusiveness," 162 S. B. 258; 188 S. B. 180.

For court decision holding that the exclusive remedy under this section applied to the accidental death of a watchman while leaving his employment premises in a taxicab after work and reversing a judgment of the Court of Claims awarding $20,000 to the widow, see Schwartz v. State of New York, 277 N. Y. Rep. 567; 251 App. Div. 634; 161 Misc. 751; 17 Ind. Bul. 151.

ACTIONS FOR DAMAGES AGAINST NON-INSURED EMPLOYERS.

An action for damages under this § 11 may commence within six years after the accident: Civil Practice Act, § 48, Subd. 2, as interpreted in Detmar v. Nussbaum, 149 Misc. 469; 185 S. B. 333; compare Schmidt v. Merchants Despatch Transportation Co., 270 N. Y. 287; Michalek v. U. S. Gypsum Co., 76 Fed. (2d) 115; 298 U. S. 639.

Action of an employee against his uninsured employer does not abate by reason of the employer's death: Opinion of Attorney-General, June 28, 1933.

In electing to bring an action for damages, the injured employee must allege that his employer has been negligent: Lindebauer v. Weiner, 94 Misc. 612; 81 S. B. 111; Dick v. Knoperbaum, 157 N. Y. Supp. 754; 81 S. B. 113; and has not secured compensation: Nulle v. Hardman, Peck & Co., 185 App. Div. 351; 97 S. B. 204; Campoccia v. Panama R. R. Co., 110 Misc. 116; 106 S. B. 249; to recover, he must prove negligence: Schein v. Feder, 154 Misc. 830; burden of showing that the employer did not carry insurance is upon the employee: Barone v. Brambach Piano Co., 101 Misc. 670; 87 S. B. 263; burden of showing that the employment was not carried on for pecuniary gain is upon the employer: Merriam v. Brooks, 203 App. Div. 52; 118 S. B. 180; a complaint not showing coverage by the Workmen's Compensation Law need not allege the employer's failure to insure: Michel v. American Cinema Corp., 182 N. Y. S. 588; 106 S. B. 60.

Relative to procedure in pleading the compensation law as a bar to action for negligence, compare Schattner v. American Tobacco Co., 100 Misc. 261; 87 S. B. 249; and Nilsen v. American Bridge Co., 176 App. Div. 915; 221 N. Y. 12; 87 S. B. 250.

Abrogation of the defenses by this section is noticed in Grimm v. Maurocordato, 191 App. Div. 550; 114 S. B. 126.

Pursuit by the employee of one of his two remedies under § 11 precludes pursuit of the other: Pavia v. Petroleum Iron Works Co., 9 S. D. R. 378; 178 App. Div. 345; 95 S. B. 271; Crineri v. Gross, 16 S. D. R. 432; 184 App. Div. 817; 95 S. B. 273; but such pursuit must be with knowledge that he is making a choice: Opinion of Attorney-General, February 1, 1935.

GENERAL NOTES.

Relative to penalty for failure to secure compensation, this § 11 and § 52, below, are to be read together.

Federal law bars from the coverage of State compensation laws accidental injuries to employees in interstate railroad commerce or admiralty; see "Introduction" above.

Other phases of the right to a negligence action are presented in the notes under § 29, below, and in the note on "Extra-State accidents" under § 2, subd. 7, above.

For liability of employer when carrier becomes insolvent see §§ 53, 106-109-j, below and notes thereunder; for deposit or other security from employer when carrier questions policy coverage, § 54-a, below.

For liability of general contractor relative to his subcontractor's injured employee, in connection with § 56, below, see Clark v. Monarch Engineering Co., 248 N. Y. 107; 156 S. B. 116.

If an injured woman employee receives compensation, her husband may not sue for loss of her services: Swan v. Woolworth Co., 6 Ind. Bul. 296; 129 Misc. 500; 156 S. B. 113.

The Appellate Division having reversed an award with opinion stating that the accident had not been incidental, and claimant having thereafter brought an action for damages, the complaint was dismissed with opinion: Culhane v. Economic Garage, 19 S. D. R. 442; 188 App. Div. 1; 195 App. Div. 108; 97 S. B. 128; 118 S. B. 178.

The Court of Appeals has interpreted "disability," as used in § 10, and elsewhere, to mean "impairment of earning capacity": Marhoffer v. Marhoffer, 220 N. Y. 543; 95 S. B. 35. It affirmed award for facial disfigurement holding that such an award is valid if the disfigurement impairs the ability of the injured person to obtain work: Sweeting v. American Knife Co., 226 N. Y. 199; 95 S. B. 75; and in this has been sustained by the U. S. Supreme Court: American Knife Co. v. Sweeting, 250 U. S. 596; 97 S. B. 15. The legislature has provided compensation for disfigurement (§ 15, subd. 3, par. "t") but not for other accidental injuries not necessarily involving impairment of earning capacity, and yet not now remedial by action for damages; e. g., loss of sexual organs: Farnum v. Garner Print Works & Bleachery, 229 N. Y. Rep. 554; 106 S. B. 249; or injury to the nasal septum: Repka v. Fedders Mfg. Co., 229 App. Div. 271; 264 N. Y. Rep. 538; 188 S. B. 107.

For question whether Attorney-General of New York or United States District Attorney should prosecute Staten Island contractor on federal project for non-insurance, see Opinion of Attorney-General, August 24, 1935.

Construction of the Ashokan Dam under special legislative act is within the compensation law's coverage: Calamari v. Winston & Co., Death Claim, No. 67471; 184 App. Div. 923; 224 N. Y. Rep. 622; 97 S. B. 204.

An employer compromised a common law suit brought on the theory that decedent was not killed in the course of his employment. Under a finding to the contrary, however, the Department of Labor made awards to the special funds under the Workmen's Compensation Law. The court reversed the awards, stating that: (1) If the injuries were received by decedent while he was not employed by the employer then the death was not the result of an industrial accident and there is no basis for the award to the special funds; or (2) if there was an industrial accident, the payment of $10,000 by the employer to the widow and minor son was in fact compensation, and the Board may not make an award to the State upon the theory that there were no dependents. Ryan v. Sheffield Farms Co., Inc., ex rel., 256 App. Div. 867; 204 S. B. 313.

Resident nurse in a hospital owned and operated by the City of New York whose contract of employment provided for her medical care became ill while on duty. She was sent to the nurses' infirmary where a deteriorated solution of morphine injected into her arm by other nurses resulted in loss of use of the arm. Decision of the Appellate Division dismissing complaint in her action against the employer for personal injuries on ground that said injuries arose out of and in the course of her employment and that therefore workmen's compensation was the exclusive remedy, reversed, with statement that, "The risk of the injury which plaintiff suffered was not incidental to her employment. It was a risk to which any one receiving like treatment at the hospital would have been subjected. The occurrence of the injury was not made more likely by the fact of her employment. Consequently, the injury did not arise out of and in the course thereof." Volk v. City of New York, 284 N. Y. 279.

On the last day of each month a State highway foreman brought several maintenance employees to the employer's office to sign the payroll. The men

were allowed two hours' pay for the trip and the foreman, in addition to this allowance, was paid for use of his truck. At noon, on November 30, 1938, said foreman called at the home of two maintenance men who had not worked in several days and brought them to the office to sign the payroll. At 1 p.m., after signing the payroll, the three men went to several places to purchase deer licenses and shells and also visited a tavern. On the way home, between 4 and 5 p.m., on the same route used in coming to the office, the truck figured in an accident. In an action at law by one of the injured maintenance men against the foreman, the trial court dismissed the complaint on ground that plaintiff was an employee when injured and that workmen's compensation was the exclusive remedy. Upon appeal, the Appellate Division reversed judgment of nonsuit and granted a new trial. Callan v. Adams, 261 App. Div. 1004.

Claimant, while employed by the State at a State school, fell on a wet floor and fractured her right leg. She received treatment by the school physician who did not diagnose the injury as a fracture, with the result that a permanent disability resulted. Before discovering the faulty diagnosis said claimant applied for and was granted benefits under the Workmen's Compensation Law. After discovering the faulty diagnosis she applied for leave to file a claim against the State of New York pursuant to the Court of Claims Act, contending that she had a right to a common law action against the employer for the resultant condition. Application denied, with statement that claimant was limited to the benefits prescribed by the Workmen's Compensation Law. Robison v. State of New York, 176 Misc. 73.

For activities of the Department of Labor against non-insurers, see Annual Reports of Industrial Commissioner, 1933, forward.

For the General Employers' Liability Law, see Chapter 121 of the Laws of 1921. See also §§ 29 and 53 of the Workmen's Compensation Law; liability of railway companies, Railroad Law, § 64; damages for injuries causing death, Constitution of New York, Art. I, § 16; Decedent Estate Law, Art. 5; and criminal liability for negligence, Penal Law, §§ 1052, 1893. Texts of the Decedent Estate Law, the Penal Law, and other liability provisions are in the Department of Labor's "Miscellaneous Labor Laws" pamphlet.

§ 12. **Compensation not allowed for first** [1]**seven days.** No compensation shall be allowed for the first [2]seven days of disability, except the benefits provided for in section thirteen of this chapter, provided, however, that in case the injury results in disability of more than [3]thirty-five days, the compensation shall be allowed from the date of the disability. [*As am'd by L.* 1917, *ch.* 705; *L.* 1924, *ch.* 318; *and L.* 1935, *ch.* 660.]

[1] Words "seven days" substituted for words "two weeks" by L. 1924, ch. 318.

[2] Word "seven" substituted for word "fourteen" by L. 1924, ch. 318.

[3] Word "thirty-five" substituted for word "forty-nine" by L. 1935, ch. 660.

WAITING PERIOD CONSTRUED.

Days of partial disability counted toward the period of more than forty-nine days, as then required, to permit compensation for the first week: Hoffman v. Crosby Co., 230 App. Div. 555; 185 S. B. 44; Farone v. Farone, 193 App. Div. 929; 114 S. B. 88.

Compensation was not allowed for the first week where award for a schedule period of partial disability lasted not more than the forty-nine days then required by this section: Oken v. Mager, 228 App. Div. 728; 185 S. B. 45; nor where the injured employee died within the forty-nine days: Gorle v. Joy Co., 230 N. Y. Rep. 595; 114 S. B. 88.

Where a six-day worker returned to work on Monday, the Sunday preceding did not count as a forty-ninth day: Munney v. Tyler Lumber Co., 214 App. Div. 830; 149 S. B. 136.

§ 13. **Treatment and care of injured employees.** [1](a) The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus [2]for such period as the nature of the injury [3]or the process of recovery may require.[4] [5]The employer shall be liable for the payment of the expenses of medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, [6]as well as artificial members of the body or other devices or appliances necessary in the first instance to replace, support or relieve a portion or part of the body resulting from and necessitated by the injury of an employee, for such period as the nature of the injury or the process of recovery may require, [7]but the employer shall not be liable for replacements or repairs of such artificial members of the body or such other devices or appliances. All fees and other charges for such treatment and services shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living.

The commissioner shall prepare and establish a schedule for the state, or schedules limited to defined localities, of minimum charges and fees for such medical treatment and care, to be determined in accordance with and to be subject to change pursuant to rules promulgated by the commissioner. Before preparing such schedule for the state or schedules for limited localities the commissioner shall request the president of the medical society of the state of New York to submit to him a report on the amount of remuneration deemed by such society to be fair and adequate for the types of medical care to be rendered under this chapter, but consideration shall be given to the view of other interested parties. The amounts payable by the employer for such treatment and services shall in no case be less than the fees and charges established by such schedule. Nothing in this schedule, however, shall prevent voluntary payment of amounts higher than the fees and charges fixed therein, but no physician rendering medical treatment or care may receive payment in any higher amount unless such increased amount has been authorized by the employer, or by decision as provided in section thirteen-g herein. [8]Nothing in this section shall be construed as preventing the employment of a duly authorized physician on a salary basis by an authorized compensation medical bureau or laboratory. [*This subd.* (*a*) *am'd by L.* 1922, *ch.* 615; *L.* 1935, *chs.* 258 *and* 930; *L.* 1939, *ch.* 540.]

[1] Subdivision letter "(a)" inserted by L. 1935, ch. 258.

[2] Words "for such period" inserted by L. 1922, ch. 615.

[3] Words "or the process of recovery" inserted by L. 1922, ch. 615.

[4] Words, "during sixty days after the injury; but the commission may where the nature of the injury or the process of recovery requires a longer period of treatment require the same from the employer" as amended by L. 1918, ch. 634, stricken out by L. 1922, ch. 615.

[5] Words "The employer shall . . . thirteen-g herein" inserted by L. 1935, ch. 258.

[6] Words "as well as . . . resulting from and" inserted by L. 1939, ch. 540.
[7] Words "but the employer . . . or appliances" inserted by L. 1939, ch. 540.
[8] Sentence "Nothing in . . . or laboratory" added by L. 1935, ch. 930.

Fee schedules. The Commissioner may not prescribe a minimum fee schedule for hospitals: Opinion of Attorney-General, December 14, 1936.

Pursuant to this subd. (a), a "Minimum Medical Fee Schedule" which applies to the entire State has been promulgated by the Industrial Commissioner. It is not reproduced here but copies may be obtained from the Department of Labor at nominal cost. Rules and regulations promulgated under §§ 13–13-j are appended below, pages 298-301.

[1](b) **In the case of persons, injured outside of this state,** but entitled to compensation or benefits under this chapter, the provisions as to selection of authorized physicians shall be inapplicable. In such cases the employer shall promptly provide all necessary medical treatment and care but if the employer fail to provide the same, after request by the injured employee such injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide the same; [2]nor shall any claim for medical or surgical treatment be valid and enforceable, as against such employer, unless within twenty days following the first treatment, the physician giving such treatment, furnish to the employer and the industrial commissioner a report of such injury and treatment, on a form prescribed by the industrial commissioner. [3]The board may, however, by the unanimous vote of all the qualified members, excuse the failure to give such notice within twenty days when it [4]finds it to be in the interest of justice to do so, and may, subject to the limitations contained in section twenty-eight of this chapter, make an award for the reasonable value of such medical or surgical treatment. All fees and other charges for such treatment and services, [5]whether furnished by the employer or otherwise, shall be subject to regulation by the [6]board as provided in section twenty-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living. [*This subd.* (*b*) *am'd by L.* 1922, *ch.* 615; *L.* 1927, *ch.* 533; *and L.* 1935, *ch.* 258.]

[1] Subdivision letter "(b)" and words "In the case . . . and care but" inserted by L. 1935, ch. 258.
[2] Words "nor shall . . . industrial commissioner" inserted by L. 1922, ch. 615.
[3] Sentence "The board . . . surgical treatment" inserted by L. 1927, ch. 553.
[4] Word "finds" substituted for word "find" by L. 1935, ch. 258.
[5] Words "whether furnished by the employer or otherwise" inserted by L. 1927, ch. 553.
[6] Word "board" substituted for word "commissioner" by L. 1927, ch. 553.

Claims for services, treatment or supplies under this subd. (b) are also regulated by § 24, below, which see.

Fees—treatment outside State. For bills of New Jersey physicians giving medical treatment to residents of New Jersey injured in New York State, see Opinion of Attorney-General, July 8, 1936.

Medical reports—filing. Employers or carriers must promptly file with the commissioner all physician, hospital or other medical reports coming into their possession: Board's Rules and Procedure, Rules 1 and 2, appended below. For the report required by this subd. (b), the Division of Workmen's Compensation of the Department of Labor supplies form C-4.

The following court interpretation applicable generally to § 13 prior to the enactment of chs. 258 and 930 of the Laws of 1935, still applies to extra-state accidents under this subd. (b):

The employer has the right to provide treatment and care: Egan v. Hearn & Son, 236 App. Div. 874; 262 N. Y. Rep. 544; 185 S. B. 19; Peterson v. Erie R. R. Co., 228 App. Div. 859, 185 S. B. 19; Balderson v. Wallace & Co. 32 S. D. R. 21; 212 App. Div. 189; 140 S. B. 119; Clark v. Ebinger Baking Co., 202 App. Div. 773; 114 S. B. 9; Junk v. Terry & Teneh Co., 176 App. Div. 855; 95 S. B. 14; Keigher v. General Electric Co., 173 App. Div. 207; 81 S. B. 267. The insurance carrier has no legal voice in the selection of the physician: Mezeritsky v. Mezeritsky & Miller, 15 S. D. R. 613, 3 Bul. 145; 185 App. Div. 919; 95 S. B. 13.

If the injured employee fails to request the employer for treatment and care, the employer is not liable for the cost thereof: Koch v. Lehigh Valley R. R. Co., 217 App. Div. 280; 244 N. Y. Rep. 578; 149 S. B. 131; Dorfman v. Levine, 260 N. Y. Rep. 665; 185 S. B. 20; Andrews v. Mullen, 234 App. Div. 537; 185 S. B. 21. Imminence of death may imply request: Mohan v. Cluett & Sons, 4 Bul. 56.

But acquieseenee of the employer in treatment and care procured by the employee renders the employer liable for the cost: Weisberg v. Alexander Bros. Furniture Co., 235 App. Div. 57; 185 S. B. 23; Cresbin v. Feldman, 235 App. Div. 116; 185 S. B. 24; Pangrazio v. Ebsary Gypsum Co., 231 App. Div. 773; 185 S. B. 25; Chait v. Grundberg, 240 App. Div. 795; 12 Ind. Bul. 240; Mezeritsky v. Mezeritsky & Miller, 15 S. D. R. 613, 3 Bul. 145; 185 App. Div. 919, 95, S. B. 13.

Inadequate or improper treatment provided by the employer justifies the employee in procuring treatment of his own selection, with liability of the employer for the cost: Kocko v. Harris Coal Co., 262 N. Y. Rep. 535; 185 S. B. 23; Finch v. Buffalo Envelope Co., 218 App. Div. 31; 244 N. Y. Rep. 557; 149 S. B. 132: Brastowiez v. Doehler Die Casting Co., 17 S. D. R. 650, 4 Bul. 24; 187 App. Div. 961; 95 S. B. 18; Marino v. Felton Construetion Co., 234 App. Div. 811; 11 Ind Bul. 63. Inadequate or improper treatment operates to the employer's disadvantage in other respeets: MeNeil v. N. Y. Central R. R. Co., 181 App. Div. 912; 95 S. B. 17; Bolee v. Patent S. S. Co., 17 S. D. R. 614, 3 Bul. 265.

If the employer provides the treatment and care and fails or refuses to pay therefor, the remedy of the physician or other party giving sueh treatment and care is a civil suit against such employer: Lewis v. Lefren, 234 App. Div. 513; 185 S. B. 37; Weinreb v. Harlem B. & L. Room, 204 App. Div. 293; 123 S. B. 8; Feldstein v. Buick Motor Co., 115 Mise. 170; 114 S. B. 11; this is true notwithstanding insertion of the words "whether furnished by the employer or otherwise" in § 13: Frant v. Cobban & Son, 133 Misc. 433; 161 S. B. 98; 226 App. Div. 796; Siegal v. Strauss, 138 Misc. 380; 185 S. B. 38. See also cases cited in 149 S. B. 133, 134; and Opinion of Attorney-General, May 10, 1932. An employer against whom a physician has obtained judgment may have judgment agalnst his earrier in turn: Zamkin v. U. S. Fidelity & Guaranty Co., 121 Misc. 699; 123 S. B. 12.

A physieian may reeover his fee from an employer authorizing treatment of his injured employee though the employee subsequently fails to get compensation: Beekman v. Claman, 155 Mise. 593.

A foreman who sends an injured employee to a hospital and a physieian obligates his employer for their bills: Bock v. Keogan, 128 Misc. 189; 149 S. B. 126.

A physician engaged by a carrier to treat an injured employee may recover his fee from the employer if the carrier is insolvent: Hyman v. Hudson Contracting Co., 152 Misc. 7; 185 S. B. 353; in such case the employer may file claim against the carrier's liquidator: Opinion of Attorney-General, September 21, 1934.

If an injured employee, or his beneficiaries, erroneously or otherwise pays for medical care and treatment for cost of which the employer is liable, the remedy of such employee or beneficiary would likewise appear to be a civil suit against the employer: Finkelstein v. N. Y. Merchandise Co., 225 App. Div. 481; 161 S. B. 95; 252 N. Y. Rep. 519; 185 S. B. 36, 37; Sandberg v. Seymour Dress Co., 215 App. Div. 728; 140 S. B. 117; 242 N. Y. Rep. 497; 161 S. B. 95.

Physicians, attorneys, etc., not being parties in interest (§ 23) do not have right of appeal from awards and decisions: Lewis v. Lefren, 234 App. Div. 513: 185 S. B. 37; Finnegan v. Catholic Charities, 236 App. Div. 767; 11 Ind. Bul. 387; Shannon v. DeGrasse Paper Co., 239 App Div. 868; 12 Ind. Bul. 170.

If the employer acquiesces in treatment and care procured by the employee or neglects to provide treatment and care, a physician or other party engaged by such employee cannot sue the employer but must look to the Department of Labor for award of his bills, such award being collectible by means of § 26, below: Bloom v. Jaffe, 94 Misc. 222; 81 S. B. 271; Hirsch v. Zurich General A. & L. Ins. Co., 97 Misc. 360; 95 S. B. 22; Semmen v. Butterick Publishing Co., 101 Misc. 285; 95 S. B. 24; Goldfiam v. Kazemier & Uhl, 181 App. Div. 140; 95 S. B. 27. If the Department holds that the employer is not liable, such physician or other party may sue the injured employee: Kennedy v. Dzengielewski, 131 Misc. 635; 156 S. B. 153; 225 App. Div. 845; 251 N. Y. Rep. 520; 9 Ind. Bul. 54.

Medical fees and charges must be such as prevail in the community for persons of like standard of living: Lawson v. Wallace & Keeney, 27 S. D. R. 179; 202 App. Div. 435; 30 S. D. R. 68; 208 App. Div. 753; 239 N. Y. Rep. 540; 114 S. B. 10; Stark v. Wohl, 211 App. Div. 827; 140 S. B. 116; Warren v. Local Milk & Cream Co., 211 App. Div. 830; 140 S. B. 116; Messenger v. Chemung Foundry Corp., 234 App Div. 810; 185 S. B. 40.

[1](c) **The liability of an employer for medical treatment** as herein provided shall not be affected by the fact that his employee was injured through the fault or negligence of a third party, not in the same employ, unless and until notice of election to sue or the bringing of suit against such third party. The employer shall, however, have an additional cause of action against such third party to recover any amounts paid by him for such medical treatment, in like manner as provided in section twenty-nine of this chapter. [*This subd.* (c) *added by L.* 1927, *ch.* 553; *and lettered* (c) *by L.* 1935, *ch.* 258.]

[1] Subdivision letter "(c)" supplied by L. 1935, ch. 258; text supplied by L. 1927, ch. 553.

See § 29, below, and notes thereunder.

Medical treatment in third party cases. Where injured employee did not take compensation but settled with third party, the insurance carrier, as subrogee of employer, was held entitled to recover from the third party the expenses of medical treatment furnished to the injured employee: Butchers Mutual Casualty Co. v. Emerald Cab Corp., 169 Misc. 749; 174 Misc. 1; 204 S. B. 228.

Where self-insured employer voluntarily extended coverage and paid compensation to employee injured by third party, said employer was held to be subrogee in an action to recover the medical expenses: City of New York v. Steers & Menke, 167 Misc. 566; 254 App. Div. 669; 204 S. B. 230.

Three year statute of limitations held applicable where carrier sued to recover medical expenses under § 29 of the Workmen's Compensation Law: U. S. Casualty Co. v. North American Brewing Co., 253 App Div. 576; 279 N. Y. Rep. 762; 204 S. B. 447.

Cessation of the employer's liability for medical treatment upon notice of election to sue or the bringing of suit against a third party has been upheld in Beekman v. Paskin, 147 Misc. 563; 185 S. B. 426; and Magrossi v. City of Niagara Falls, 243 App. Div. 827; 14 Ind. Bul. 85.

[1](d) **The industrial board, on its own motion, or a referee,** upon the recommendation of the chief medical examiner for the workmen's compensation division, hearing a claim for compensation may require examination of any claimant by a physician especially qualified with respect to the diagnosis or treatment of the disability for which compensation is claimed; and may require a report from such physician on the diagnosis, the causal relationship between the alleged injury and subsequent disability, proper treatment, and the extent of the disability of such claimant. The physician to conduct such examination shall be designated by the commissioner from a panel of especially qualified physicians submitted to him by the medical society of the county, or any other board acting for any school of medical practice. Additional names for such panel shall be furnished by the society whenever requested by the commissioner and if such request is not complied with in thirty days the industrial commissioner may add thereto names of his own selection. The employer or his insurance carrier shall pay for such examination in an amount to be directed by the industrial commissioner. [*Added by L.* 1935, *ch.* 258.]

[1] This subd. "(d)" added by L. 1935, ch. 258.

See also below, § 13-a, subd. (4), §§ 19, 19-a, 41 and Board Rule 11.

§ 13-a. **Selection of authorized physician by employee.** (1) **An injured** employee may, when care is required, select to treat him any physician authorized by the commissioner to render medical care, as hereafter provided. If for any reason during the period when medical treatment and care is required, the employee wishes to transfer his treatment and care to another authorized physician, he may do so, in accordance with rules prescribed by the commissioner. In such instance the remuneration of the physician whose services are being dispensed with shall be limited to the value of treatment rendered at minimum fees as established in the schedule for his location, unless payment in higher amounts has been approved as authorized in section thirteen, paragraph a. If the employee is unable due to the nature of the injury to select such authorized physician and the emergency nature of the injury requires immediate medical treatment and care, or if he does not desire to select a physician, and in writing so advises the employer, the employer shall promptly provide him with the necessary medical care, provided however, that nothing herein contained shall operate to prevent such employee, when subsequently able to do so, from selecting for continuance of any medical treatment or care required, any physician authorized by the commissioner to render medical care as hereinafter provided.

An employer may maintain a licensed compensation medical bureau, use of which shall be optional with his injured employee: § 13-j, subd. (2), below.

Compare §§ 13-i, 13-j and notes thereunder.

Employee, agent of employer. An employee exercising his statutory right in choosing a physician does so as agent of the employer and binds the latter for cost of the treatment: Armstrong v. Weiss and Others, 168 Misc. 653; 204 S. B. 232.

(2) **The commissioner shall prescribe the form** of a notice informing employees of their privilege under this chapter, and such notice shall be posted and maintained by the employer in a conspicuous place or places in and about his place or places of business.

The commissioner has prescribed the notice form required by this subd. (2) to be posted by employers, including self insurers. It is No. 105. Its size may not be reduced without his consent: Rules of Comr., Rule 20. It contains numbered instructions addressed "To employers" and "To employees." Combined with this posting notice is the posting notice required by § 51, below.

To avoid the solicitation banned by § 13-i below, the commissioner may so formulate the notice required by this subd. (2) as to exclude the names of physicians from it: Opinion of Attorney-General, July 8, 1935.

(3) **The employer shall have the right to transfer** the care of an injured employee from the attending physician, whether chosen originally by the employee or by the employer, to another authorized physician (1) if the interest of the injured employee necessitates the transfer or (2) if the physician has not been authorized to treat injured employees under this act or (3) if he has not been authorized under this act to treat the particular injury or condition as provided by section thirteen-b (2). An authorized physician from whom the case has been transferred shall have the right of appeal to an arbitration committee as provided in subdivision two of section thirteen-g and if said arbitration committee finds that the transfer was not authorized by this section, said employer shall pay to the physician a sum equal to the total fee earned by the physician to whom the care of the injured employee has been transferred, or such proportion of said fee as the arbitration committee shall deem adequate.

(4) **No claim for medical or surgical treatment shall** be valid and enforceable, as against such employer, or employee, unless within forty-eight hours following the first treatment the physician giving such treatment furnish to the employer and the industrial commissioner a preliminary notice of such injury and treatment, [1]within [2]fifteen days thereafter a more complete report [3]and subsequent thereto progress reports if requested in writing by the industrial commissioner, industrial board, employer or insurance carrier, at intervals of not less than three weeks apart or at less frequent intervals if requested on [4]forms prescribed by the industrial commissioner. The industrial board may excuse the failure to give such notices within the designated periods when it

finds it to be in the interest of justice to do so. Upon receipt of the notice herein provided the employer shall be entitled to have the claimant examined by a qualified physician at a place reasonably convenient to the claimant and in the presence of the claimant's physician, and refusal by the claimant to submit to such examination at such time or times as may reasonably be necessary in the opinion of the industrial board, shall bar the claimant from recovering compensation for any period during which he has refused to submit to such examination.

[1] Word "and" eliminated by L. 1940, ch. 542.

[2] Word "fifteen" substituted for word "twenty" by L. 1940, ch. 542.

[3] Words "and subsequent . . . frequent intervals if requested" inserted by L. 1940, ch. 542.

[4] Word "forms" substituted for words "a form" by L. 1940, ch. 542.

All C-4 reports of attending physicians should be verified for evidence purposes: Rules of Comr., Rule 4, below, page 298.

Concerning physical examinations, see also § 13, subd. (d), above, and §§ 19, 19-a, 41; Rules of Board, Rule 11, appended below, and Rules of Comr., Rule 25, page 300.

(5) **No claim for specialist consultations, surgical** operations, or physio-therapeutic procedures costing more than twenty-five dollars shall be valid and enforceable, as against such employer, unless such special services shall have been authorized by the employer or by the commissioner, or unless such authorization shall have been unreasonably withheld, or unless such special services are required in an emergency. No claim for X-ray examinations or special diagnositc laboratory tests costing more than ten dollars shall be valid and enforceable, as against such employer, unless such special services shall have been authorized by the employer or by the commissioner, or unless such authorization shall have been unreasonably withheld, or unless such special services are required in an emergency. [*This* § 13-*a added by L.* 1935, *ch.* 258; *and am'd by L.* 1940, *ch.* 542.]

See also Rules of Industrial Comr., Rules 5–9, 21, below, pages 298, 300, relative to authorization, selection, reports and supervision of specialists.

Liability for disability period preceding herniotomy. Liability for disability period dating from an employee's incurrence of hernia until operation was performed three months later was charged against the employer and its carrier where the operation was recommended by a physician two days after the accident but the employer failed to provide it until directed so to do by the Department of Labor: Shades v. McCloskey & Co., 259 App. Div. 766; 204 S. B. 234.

§ 13-b. **Authorization of physicians by commissioner. 1. The commissioner** shall upon the recommendation of the medical society of each county or of a board designated by such county society, or by a board representing duly licensed physicians of any other school of medical practice, authorize physicians licensed to practice medicine in the state of New York to render medical care under this chapter. If, within sixty days after the commissioner requests such recommendations, the medical society of any county or board

fails to act, or if there is no such society in a county, the commissioner shall designate a board of three qualified physicians, who shall make the requested recommendations. No such authorization shall be made in the absence of recommendation of the appropriate society or board or of review and recommendation of the industrial council as provided in clause (g) of subdivision four of section ten-a of the labor law. No person shall render medical care under this chapter without such authorization of the commissioner, provided, that: (a) emergency (first aid) medical care may be rendered under this chapter by any physician licensed to practice medicine in the state of New York without authorization by the commissioner under this section; and

(b) a licensed physician who is a member of a constituted medical staff of any hospital may render medical care under this chapter while an injured employee remains a patient in such hospital; and

(c) under the active and personal supervision of an authorized physician medical care may be rendered by a registered nurse, [1]registered physiotherapist or other person trained in laboratory or diagnostic technics within the scope of such persons' specialized training and qualifications. This supervision shall be evidenced by signed records of instructions for treatment and signed records of the patient's condition and progress. Reports of such treatment and supervision shall be made by such physician to the commissioner on such forms and at such times as the commissioner may require. [*This subd.* 1 *am'd by L.* 1935, *ch.* 930.]

[1] Word "registered" inserted by L. 1935, ch. 930.

Fees of dentists, physiotherapists and unauthorized physicians. Dentists may treat injured employees without authorization: Opinion of Attorney-General. November 2, 1936.

Physiotherapist who treated injured employee upon advice of carrier's physician and with carrier's acquiescence must look to the employer and its carrier for payment and may not recover his fee for such treatments from the employee: Sprague v. Spencer, 172 Misc. 123; 204 S. B. 242.

A physician not authorized under this § 13-b may not recover by legal process his fee for treating an injured employee: § 13-f, below; Szold v. Outlet Embroidery Supply Co., 159 Misc. 911; 248 App. Div. 865; 274 N. Y. 271; 275 N. Y. Rep. 542; 303 U. S. 623; 204 S. B. 235.

For bills of New Jersey physicians giving medical treatment to residents of New Jersey injured in New York State, see Opinion of Attorney-General, July 8, 1936.

2. **A physician licensed to practice medicine in** the state of New York who is desirous of being authorized to render medical care under this chapter, shall file with the medical society in the county in which his office is located, or with a board designated by such society, or by a board designated by the commissioner as provided in section thirteen-b, an application for authorization under this chapter. In such application he shall state his training and qualifications and shall agree to limit his professional activities

under this chapter to such medical care as his experience and training qualify him to render. He shall further agree to refrain from subsequently treating for remuneration, as a private patient, any person seeking medical treatment in connection with, or as a result of, any injury compensable under this chapter, if he has been removed from the list of physicians authorized to render medical care under this chapter, or if the person seeking such treatment has been transferred from his care in accordance with the provisions of this chapter. This agreement shall run to the benefit of the injured person so treated and shall be available to him as a defense in any action by such physician for payment for treatment rendered by a physician after he has been removed from the list of physicians authorized to render medical care under this chapter, or after the injured person was transferred from his care in accordance with the provisions of this chapter. The medical society or a board designated by it, or by a board as otherwise provided in section thirteen-b, if it deems such licensed physician duly qualified, shall recommend to the commissioner that such physician be authorized to render medical care under this chapter, and such recommendation and authorization shall specify the character of the medical care which such physician is qualified and authorized to render under this chapter. A licensed physician may present to the medical society or board evidences of additional qualifications at any time subsequent to his original application. If the medical society or board fails to recommend to the commissioner that a physician be authorized to render medical care under this chapter, the physician may appeal to the industrial council as provided in clause (g) of subdivision four of section ten-a of the labor law.

Medical compensation boards must pass upon a physician's application within ninety days and notify the commissioner: Rules of Ind. Council, Rule 1.

Constitutionality. This subdivsion does not violate the Federal or State constitutions nor does it constitute an unlawful delegation of power: Szold v. Outlet Embroidery Supply Co., 274 N. Y. 271, affirming 248 App. Div. 865; 159 Misc. 911; appeal dismissed, 303 U. S. 623; 204 S. B. 235.

Industrial Council—functions. For provisions set forth on application blank and functions of the Industrial Council as an appellate body under this subdivision, see Opinions of Attorney-General, March 16, 1936, and June 19, 1936.

3. **Laboratories and bureaus engaged** in x-ray diagnosis or treatment or in physiotherapy or other therapeutic procedures and which participate in the diagnosis or treatment of injured workmen under this chapter shall be operated or supervised by qualified physicians duly authorized under this chapter [1]and shall be subject to the provisions of section thirteen-c of this chapter. The person in charge of diagnostic clinical laboratories duly authorized under this chapter shall possess the qualifications established by the public health council for approval by the state commissioner of health or, in the city of New York, the qualifications approved by the board of health of said city and shall maintain

the standards of work required for such approval. [*This subd.* 3 *am'd by L.* 1935, *ch.* 930; *this* § 13-*b added by L.* 1935, *ch.* 258.]

[1] Words "and shall . . . of this chapter" inserted by L. 1935, ch. 930.

Concerning x-ray services and payment therefor, see also Rules of Comr., Rules 7, 9, 13, 22, below.

§ 13-c. **Licensing of compensation medical bureaus [1] and laboratories.** (1) The commissioner may, upon the recommendation of the medical society of each county or of a board designated by such county society, or of a board as provided in section thirteen-b, authorize and license compensation medical bureaus, [2]operated by qualified physicians wholly or principally for the diagnosis and treatment of industrial injuries or illnesses in respect of which they are authorized to render medical care under this chapter. [3]The commissioner may, upon the recommendation of the medical society of each county or of a board as provided in section thirteen-b, authorize and license separate laboratories and bureaus engaged in x-ray diagnosis or treatment, in clinical diagnosis, or in physiotherapy or other therapeutic procedures, which participate in the diagnosis or treatment of injured workmen under this chapter. Application for such authorization shall be made on forms to be furnished by the commissioner and shall disclose in full the nature of the personnel and equipment of such bureaus. [6]If within sixty days after such application has been filed the medical society or board refuses or fails to act or refuses to recommend to the commissioner that such license be granted, the applicant may appeal to the industrial council as provided in subdivision four-a of section ten-a of the labor law. Each such bureau [4]or laboratory which receives such authorization shall:

(a) make reports on its personnel and equipment in such form and at such times as may be required by the commissioner; and

(b) be subject to inspection by the commissioner or the medical society of the county in which such bureau or laboratory is located; and

(c) pay to the commissioner a license fee of fifty dollars per annum for each office of such bureau [5]or ten dollars per annum for a separate laboratory. [*This* § 13-*c added by L.* 1935, *ch.* 258; *am'd by L.* 1935, *ch.* 930; *L.* 1941, *ch.* 307.]

[1] Words "and laboratories" added by L. 1935, ch. 930.

[2] Word "operated" substituted for word "maintained" by L. 1935, ch. 930.

[3] Sentence "The commissioner . . . this chapter" inserted by L. 1935, ch. 930.

[4] Words "or laboratory" inserted by L. 1935, ch. 930.

[5] Words "or ten dollars per annum for a separate laboratory" inserted by L. 1935, ch. 930.

[6] Words "No such authorization shall be made in the absence of recommendation from the appropriate society or board" stricken out and sentence "If within . . . the labor law" inserted by L. 1941, ch. 307.

Employers may maintain compensation medical bureaus: § 13-j, subd. (2), below.

Hospitals may not be licensed to operate compensation medical bureaus: Rules of Comr., Rule 17, below, page 299.

Lay owned medical laboratories—licensing requirements. Lay owned or incorporated laboratories and compensation medical bureaus are entitled to license under this § 13-c, subject to the requirements of subd. 3 of § 13-b, above: Opinions of Attorney-General, November 24, 1935 and September 16, 1936.

Municipal medical bureau—liability for license fee. A municipality must pay the fifty dollar license fee of par. (c) of this § 13-c for each office of a medical bureau maintained by it; the fee is not a tax: Opinion of Attorney-General, November 15, 1935.

§ 13-d. **Removal of physicians from lists of those authorized to render medical care.** 1. **The medical society or** board that has recommended the authorization of physicians to render medical care under this chapter shall investigate, hear and determine all charges of professional or other misconduct by any authorized physician, [1]as herein provided, under rules and procedure to be prescribed by the industrial council of the department of labor and shall report evidence of such misconduct, with their determination thereon, to the commissioner. Such investigation, hearing, report and determination may be made by the board of an adjoining county upon the request of the medical society of the county in which the alleged misconduct or infraction of this chapter occurred. The industrial council of the department may review the determination of such medical society or board, and on application of the physician accused must do so, and may reopen the matter and receive further evidence. The decision and recommendation of such industrial council shall be final, binding and conclusive upon the industrial commissioner. [*This subd.* 1 *am'd by L.* 1941, *ch.* 307.]

[1] Words "or by any compensation medical bureau licensed" eliminated by L. 1941, ch. 307.

See subds. 4 and 4-a of § 10-a of the Labor Law for the broad powers of the Industrial Council relative to charges against physicians, including regulation of investigative procedure.

See Rules of Ind. Council, Rule 2, below, regulating investigations of physicians' misconduct and appeals of physicians to the Industrial Council.

2. **The commissioner shall remove** from the list of physicians authorized to render medical care under this chapter the name of any physician who he shall find after reasonable investigation is disqualified because such physician (a) has been guilty of professional or other misconduct or incompetency in connection with medical services rendered under this chapter; or

(b) has exceeded the limits of his professional competence in rendering medical care under this chapter or has made materially false statements concerning his qaulifications in his application for the recommendation of the medical society in the county in which his office is located, or of the board designated by it, or of a board as provided in section thirteen-b; or

(c) has failed to submit full and truthful medical reports[1] to the commissioner, [2]the industrial board, [3]or the employer within the time limits provided in section thirteen-a, subdivision four, of this chapter with the exception of injuries which do not require more than ordinary first aid or loss of time beyond the working day or shift; or

(d) has rendered medical service under this chapter for a fee less than fixed by the commissioner as the minimum rate in his locality; or

(e) has participated in the division, transference, assignment, rebating, splitting or refunding of a fee for medical care under this chapter; or

(f) has solicited, or has employed another to solicit for himself or for another the professional treatment, examination or care of an injured employee in connection with any claim under this chapter.

Nothing in this section shall be construed as limiting in any respect the power or duty of the commissioner to investigate instances of misconduct, either before or after investigation by a medical society or board as herein provided, or to temporarily suspend the authorization of any physician that he may believe to be guilty of such misconduct. [*This subd.* 2 *am'd by L.* 1941, *ch.* 307; *this* § 13-*d added by L.* 1935, *ch.* 258.]

[1] Words "required to be made by him" eliminated by L. 1941, ch. 307.
[2] Word "or" eliminated by L. 1941, ch. 307.
[3] Words "or the employer . . . day or shift" inserted by L. 1941, ch. 307.

§ 13-e. **Revocation of licenses to compensation medical bureaus.** The commissioner shall revoke the license of any compensation medical bureau upon a finding certified to him by the medical society, or board [1]designated by such county medical society, or by a board as provided in section thirteen-b, that has recommended the licensing of such compensation medical bureau, or by the industrial council, that such bureau has been guilty of professional or other misconduct, or of violation of the provisions of this chapter, or that the personnel of such bureau is not properly qualified under this chapter or that the equipment of such bureau is inadequate for the proper rendering of medical care, [2]except on request for review within sixty days after such certification.

A medical society or board may upon direction of the commissioner or upon its own motion investigate[3] the alleged grounds for revocation of the license of any compensation medical bureau whose licensing it had previously recommended. Such [4]bureau shall be notified of the charges against [5]it and shall be given reasonable opportunity to be heard and to present evidence in [6]its behalf. Upon the completion of its investigation such society or board shall communicate its findings to the commissioner and to the [4]bureau whose conduct was investigated, and shall file with the commissioner a record of the evidence upon which such findings were based.

[7]Upon request of the industrial commissioner or upon application of any laboratory or employer's medical bureau, the industrial council shall review the findings and recommendations of such medical society or board and reopen the matter and receive further evidence and file with the commissioner a record of evidence taken with its findings and recommendations.

Nothing in this section shall be construed as limiting in any respect the power or duty of the commissioner to investigate instances of misconduct, [8]or violations of the provisions of this chapter or violations of rules promulgated by the industrial commissioner under the provisions of this chapter or failure to submit full and truthful medical reports to the industrial commissioner within the time limits provided in subdivision four of section thirteen-a of this chapter, either before or after investigation by a medical society or board as herein provided [9]and to temporarily suspend the license of any [10]laboratory or employer's medical bureau [11]or after a hearing revoke the same. [*This* § 13-*e added by L.* 1935, *ch.* 258*; am'd by L.* 1941, *ch.* 307.]

[1] Word "designated" substituted for word "designed" by L. 1941, ch. 307.

[2] Words "except . . . such certification" inserted by L. 1941, ch. 307.

[3] Words "the alleged disqualification, as defined in this section, of any physician whose authorization to render medical care under this chapter it had previously recommended, or" eliminated by L. 1941, ch. 307.

[4] Words "physician or" eliminated by L. 1941, ch. 307.

[5] Words "him or" eliminated by L. 1941, ch. 307.

[6] Words "his or" eliminated by L. 1941, ch. 307.

[7] Following paragraph added by L. 1941, ch. 307.

[8] Words "or violations . . . section thirteen-a of this chapter" inserted by L. 1941, ch. 307.

[9] Word "and" substituted for word "or" by L. 1941, ch. 307.

[10] Word "compensation" eliminated and words "laboratory or employer's" inserted by L. 1941, ch. 307.

[11] Words "that he may believe to be guilty of such misconduct" eliminated and words "or after a hearing revoke the same" inserted by L. 1941, ch. 307.

§ 13-f. **Payment of medical fees.** (1) Fees for medical services shall be payable only to a physician or other lawfully qualified person permitted by section thirteen-b of this chapter to render medical care under this chapter, or to the agent or to the executor or administrator of the estate of such physician. No physician rendering treatment to a compensation claimant, shall collect or receive a fee from such claimant within this state, but shall have recourse for payment of services rendered only to the employer under the provisions of this chapter. Hospitals shall not be entitled to receive the remuneration paid to physicians on their staff for medical and surgical services.

(2) Whenever his attendance at a hearing is required, the physician of the injured employee shall be entitled to receive a fee from the employer, or carrier, in an amount to be fixed by the [1]industrial board in addition to any fee payable under section one hundred twenty. [*This* § 13-*f added by L.* 1935, *ch.* 258; *and am'd by L.* 1940, *ch.* 60.]

[1] Words "industrial board" substituted for word "commissioner" by L. 1940, ch. 60.

Concerning payment of bills for x-ray and other consultants, see Rules of Comr., Rules 7, 9, 13 and 22 below.

Medical laboratories. Lawfully qualified medical laboratories may submit bills for services: Opinion of Attorney-General, May 26, 1936.

Municipal hospitals. The Department of Hospitals of the City of New York is entitled to the fee for services rendered in emergency cases: Opinion of Attorney-General, April 16, 1936.

Physiotherapists. Payment of fees of a physiotherapist figured in Sprague v. Spencer, 172 Misc. 123; 204 S. B. 242.

Unauthorized physicians. A physician not authorized under § 13-b, above, may not recover his fee for treating an injured employee: Szold v. Outlet Embroidery Supply Co., 159 Misc. 911; 248 App. Div. 865; 274 N. Y. 271; 275 N. Y. Rep. 542; 303 U. S. 623; 204 S. B. 235.

Witness fees. Fees for appearance and testimony are payable by the employer or carrier even if the claim is found to be not compensable: Opinion of Attorney-General, March 3, 1937.

§ 13-g. **Payment of bills for medical care.** (1) **Unless within** thirty days after a bill has been rendered to the employer by the physician or hospital which has treated an injured employee, such employer shall have notified the commissioner and such physician or hospital in writing that such employer demands an impartial examination of the fairness of the amount claimed by such physician or hospital for his or its services, the right to such an impartial examination shall be deemed to be waived and the amount claimed by such physician or hospital shall be deemed to be the fair value of the services rendered by him or it.

(2) **If the parties fail to agree** as to the value of medical aid rendered under this chapter such value shall be decided by an arbitration committee consisting of two physicians designated by the president of the medical society of the county in which the claimant resides, and two physicians, also members of the medical society of the state of New York, appointed by the employer or carrier. The majority decision of the arbitration committee shall be conclusive upon the parties as to the value of the services rendered. In the event of equal division, the committee shall select a fifth physician, also a member of the medical society of the state of New York, whose decision shall be conclusive. If the physician whose charges are being arbitrated is a member in good standing of the New York Osteopathic Society or the New York Homeopathic Society, the members of such arbitration committee to be appointed, similarly, shall be physicians of such organization and the president of such organization shall make the designation provided herein.

(3) **The parties to arbitration proceedings** under this section shall each pay to the industrial commissioner a sum equal to five per centum of the amount payable under such decision, or a minimum of two dollars, whichever is greater. From sums so collected the commissioner shall pay to each member of the arbitration committee, a per diem fee of ten dollars for each arbitration session attended.

[1](4) **In claims where the employer has failed to secure compensation** to his employees as required by section fifty of this chapter, the board may make an award for the value of medical

services or treatment rendered to such employees, in accordance with the schedule of fees and charges prepared and established under the provisions of section thirteen-a of this chapter. Such award shall be made to the physician or hospital entitled thereto. A default in the payment of such award may be enforced in the manner provided for the enforcement of compensation awards as set forth in section twenty-six of this chapter.

In all cases coming under this subdivision the payment of the claim of the physician or hospital for medical or surgical services or treatment shall be subordinate to that of the claimant or his beneficiaries. [*This* § 13-*g added by L.* 1935, *ch.* 258; *and am'd by L.* 1940, *ch.* 542.]

[1] Subdivision (4) added by L. 1940, ch. 542.

Failure to request timely arbitration. A physician brought an action at law for amount due for services rendered to employee of defendant employer injured in an industrial accident. Said employer had made no demand on the Industrial Commissioner for examination of the fairness of the amount claimed until more than sixty days had elapsed after rendition of the bill. The physician refused to submit his bill to arbitration contending the right to such relief had expired at the end of thirty days. Judgment for plaintiff upheld. Raisman v. Ashford Roofing Co., Inc., 261 App. Div. 782.

Hospital bills. The arbitration provisions of this section apply to hospitals as well as to physicians: Reddy v. Pegram, 169 Misc. 841; 204 S. B. 244.

Arbitration provisions relative to payment of disputed medical bills are not in conflict with New York City Charter: Opinion of Attorney-General, March 10, 1938.

§ 13-h. **Medical treatment by public hospitals.** Hospitals maintained wholly by public taxation may treat only emergency cases under this chapter, and may treat such emergency cases only so long as the emergency exists; [1]provided however, that this section shall not apply to cases arising under article four-a of this chapter. This section shall not be applicable, where there is not available a hospital other than a hospital maintained by taxation, nor shall it prevent any municipal, county or state hospital from rendering medical services to employees of such hospital or such political subdivision. [*This* § 13-*h added by L.* 1935, *ch.* 258; *and am'd by L.* 1940, *ch.* 548.]

[1] Words "provided . . . of this chapter" inserted by L. 1940, ch. 548.

Concerning copies of records, duration of emergency status and identification of insurance company visitants in hospital cases, see Rules of Comr., Rules 5, 15, and 16, below.

§ 13-i. **Solicitation prohibited.** Any person who shall make it a business to solicit employment for any person authorized by this chapter to render medical care to an injured employee in connection with any claim under this chapter, shall be guilty of a misdemeanor, except that the employer shall have the right subject to regulations prescribed by the commission, to recommend to the injured employee the names of enrolled physicians who he believes to be competent to treat him. [*This* § 13-*i added by L.* 1935, *ch.* 258.]

Rules of Comr., Rule 19, prohibits advertising of any nature on compensation work.

Concerning prosecutions under this § 13-i, see Opinions of Attorney-General, November 7, 1935, and September 20, 1937.

Solicitation construed. For rules regarding supplying of names of authorized physicians by carriers to their policyholders and procedure to be followed by medical inspectors and consultants engaged by insurance carriers and employers, see Opinions of Attorney-General, August 10, 1936 and May 19, 1937. The permission to recommend a physician is granted to the carrier only where the employee has waived his right or is unable to exercise it: Opinion of Attorney-General, May 14, 1936. Compare 13-a, above, and § 13-j, immediately following.

§ 13-j. **Medical or surgical treatment by insurance carriers and employers.** (1) An insurance carrier shall not participate in the treatment of injured workmen, except that it may employ medical inspectors to examine compensation cases periodically, while under treatment, and report upon the adequacy of medical care, and other matters relative to the medical conduct of the case [1]and that it may maintain rehabilitation bureaus operated by qualified physicians if authorized by the commissioner in accordance with section thirteen-c of this chapter. [*This subd.* (1) *am'd by L.* 1935, *ch.* 1930.]

[1] Rest of subd. (1) added by L. 1935, ch. 930.

Identification of insurance carrier visitants remains with hospitals: Rules of Comr., Rule 16.

(2) An employer may maintain a compensation medical bureau at the place or places of employment, if such bureau is required because of the nature of the industrial hazards, or the frequency of injuries to employees arising out of industry. Such bureau or bureaus shall be authorized and licensed pursuant to section thirteen-c, and their use by an injured employee shall be optional in accordance with the provisions of section thirteen-a. [*This* § 13-*j added by L.* 1935, *ch.* 258; *and am'd by L.* 1935, *ch.* 930.]

General Notes on §§ 13–13-j

Other provisions governing medical care. For provisions of the Workmen's Compensation Law governing medical care and treatment additional to those of these §§ 13–13-j, see §§ 12, 19, 19-a, 19-b, 25-a, 29, 33, 41, 91 and 124; for supervisory organization and powers of the Industrial Council relative to medical practice and practitioners, Labor Law, § 10-a.

History. For history of the radical amendment of this § 13 and the addition of the ten new §§ 13-a to 13-j, following, by L. 1935, chs. 258 and 930, see Governor's Message, (1934) 184 S. B. 43, and Reports of Physician Committees, N. Y. Legislative Documents (1932) No. 83 and (1934) No. 75. An attack upon the constitutionality of these 1935 medical practice amendments was successfully combatted by New York courts and dismissed by the U. S. Supreme Court because no substantial federal question was involved: Szold v. Outlet Embroidery Supply Co., 303 U. S. 623; 274 N. Y. 271; 248 App Div. 865; 204 S. B. 235. For court interpretation of § 13, as it read prior to amendment in 1935, see 162 S. B. 108–111, and 185 S. B. 18–42; for review of the operation of it by the Industrial Commissioner, see Bulletin No. 577, U. S. Bureau of Labor Statistics (1933), pages 27–49.

Claim filing and notice of accident as affecting liability for medical treatment. An employer is not liable for medical care and treatment if claim for compensation according to § 28 has not been made: Staff v. Eagle Warehouse & Storage Co., 30 S. D. R. 326; 209 App. Div. 307; 133 S. B. 170; or if notice of accident according to § 18 has not been given: Schultz v. Flexlume Corp., 236 App Div. 748; 185 S. B. 26.

Disability or death ensuing upon treatment for conditions unrelated, as well as related, to accident—liability. Disability or death from accident, infection, pneumonia or other untoward incident of operative or other medical care and treatment necessitated by an original accident is compensable: Lofstedt v. U. S. Gypsum Co., 258 N. Y. 222; 185 S. B. 29; Pecorella v. Bartenbach, 249 N. Y. Rep. 610; 161 S. B. 73; Huhn v. Gehnrich Indirect Heat Oven Co., 250 N. Y. Rep. 568; 161 S. B. 94; Austin v. Keen's English Chop House, 220 App. Div. 788; 149 S. B. 231; Wright v. Bowman, 225 App. Div. 836; 185 S. B. 32; Hall v. Topp, 226 App Div. 836; 8 Ind. Bul. 632; Hurrell v. Peoples Ice Co., 229 App. Div. 816; 9 Ind. Bul. 238; Mulholland v. Grant & Fennel, 235 App. Div. 645; 11 Ind. Bul. 161; Graziadei v. Yankee Polish Co., 236 App. Div. 767; 11 Ind. Bul. 388; Rekuc v. Barnet & Son, 262 N. Y. Rep. 676; 185 S. B. 473; Ryf v. Dillman, 239 App. Div. 869; 12 Ind. Bul. 170; Prince v. Prince Frame Picture Corp., 241 App. Div. 898; 13 Ind. Bul. 179; but compare Fischer v. Hoe & Co., 224 App. Div. 335; 161 S. B. 181; and Sherman v. Orwasher, 229 App. Div. 39; 177 S. B. 166. For death from an appendectomy incidental to a herniotomy, see Davis v. Anderson, 271 N. Y. Rep. 643; 15 Ind. Bul. 225; and Hoffman v. Pierce Arrow Motor Co., 193 App. Div. 123; 106 S. B. 237.

A crane operator sustained a left hernia in the course of his employment. The surgeon also repaired an existing right hernia. Death ensuing from embolism was held compensable: Natello v. Hockensmith Contracting Co., Inc., 259 App. Div. 769; 204 S. B. 172. A laborer sustained a right hernia and was operated on by the carrier's physician for an unrelated left hernia as well. Award for disability due to the operation was affirmed: Gregory v. Kennedy Construction Co., 254 App. Div. 610; 204 S. B. 172. A painter while in hospital for pelvic injuries sustained in course of his employment developed gangrenous appendicitis, operation for which proved fatal. Award of death benefits was affirmed: Chambers v. Universal Advertising Corp., 253 App. Div. 854; 204 S. B. 173.

Hospital board as distinguished from medical care. The employer or carrier is not liable for hospital board, clothing and maintenance for an insane or epileptic employee, as distinguished from medical care: David v. Arborio, 241 App. Div. 900; 185 S. B. 39; Wiznitzer v. Asner, 246 App. Div. 661; 204 S. B. 226; re hospitalization of such employees, see also Opinion of Attorney-General, December 26, 1933. Re conformity of hospital fees to prevailing community charges, see Messenger v. Chemung Foundry Corp., 234 App. Div. 810; 185 S. B. 40.

Housekeeping and other expenses necessitated by accident—carrier's liability. The Industrial Board made award for services of a housekeeper necessitated by an accident: Kwiatkowski v. Lustrader Construction Co., affirmed, 214 App. Div. 741; 140 S. B. 121; and for artificial milk for an infant necessitated by accidental impairment of a mother's lactation: Moore v. Maitland Estate, 32 S. D. R. 409; 140 S. B. 120.

Malpractice. The Court of Appeals held that the amount collected by an injured employee from a physician for malpractice in treating him for his injury was an offset against the compensation provided by the Workmen's Compensation Law: Parchefsky v. Kroll Bros. 267 N. Y. 410; 185 S. B. 369. The Appellate Division upheld the right of the injured employee to sue the physician treating his injury for malpractice in Hoehn v. Schenck, 221 App. Div. 371; 156 S. B. 144; White v. Matthews, 221 App. Div. 551; 156 S. B. 147; and Mulholland v. Grant & Fennel, 235 App. Div. 645; 11 Ind. Bul. 161. It decided for defendant with opinion in the malpractice case, Stone v. Goodman, 241 App. Div. 290; 185 S. B. 377.

Medical expenses—limitations. The $5,000 and $4,000 compensation maximums of § 15, subds. 2 and 5, for temporary disability do not limit the liability

of employers for medical expenses nor does the liability of an employer or carrier for medical treatment and care terminate with the end of the compensation period: Lawrence v. N. Y. Butchers Dressed Meat Co., 266 N. Y. Rep. 425; 13 Ind. Bul. 334.

Nursing services rendered by relatives. If authorized by the employer, services of a mother, brother or other relative as a practical nurse is compensable: Norris v. Phillips, 236 App. Div. 864; 11 Ind. Bul. 445; Welsh v. Vanleigh Furniture Co., 236 App. Div. 864; 11 Ind. Bul. 447; Shine v. Becker Moore Co., 213 App. Div. 606; 140 S. B. 121; Pocaroba v. May Co., 227 App. Div. 828; 185 S. B. 34; Brown v. Walton Water Co., 26 S. D. R. 196; 199 App. Div. 948; 114 S. B. 11; Sloane v. Vanderlip, 242 App. Div. 742; 185 S. B. 34; Silny v. Margulies, 33 S. D. R. 472; 216 App. Div. 776; 149 S. B. 132; Dunham v. Phelan & Sullivan, 1 Bul. No. 9, p. 30; Holstein v. City of New York, 256 App. Div. 140; 280 N. Y. Rep. 745; 204 S. B. 226; but see Walsh v. Brooklyn Daily Eagle, 236 App. Div. 876; 262 N. Y. Rep. 657; 185 S. B. 33.

Prolongation of disability due to misconduct of injured employee, etc.—liability. Sometimes misconduct of the injured employee prolongs disability or transforms a trivial injury into a fatal one; earlier cases of the kind are in 95 S. B. 16, 19; 133 S. B. 115. The Appellate Division remitted the cases of employees who removed splints, bandages, etc.: Germantown v. American Radiator Co., 214 App. Div. 746; 140 S. B. 114; renewed award affirmed, 35 S. D. R. 625; 217 App. Div. 807; 156 S. B. 151, 152; Kozorral v. International Paper Co., 217 App. Div. 809; renewed award affirmed, 222 App. Div. 785; 156 S. B. 152; an employee who neglected treatment for his injured eye: Malvasio v. Schwartz, 216 App. Div. 775; 149 S. B. 127; and an employee who set his finger bandage afire in lighting a cigarette: Fischer v. Hoe & Co., 224 App. Div. 335; 161 S. B. 181.

Public employees—medical expenses in relation to pension benefits. Section 67 of the Civil Service Law exempts accident benefits of civil service employees under §§ 65 and 65-a of said law from deduction of the cost of treatment and care under this § 13.

Refusal of treatment, etc. Refusal of operative or other treatment and care by an injured employee must be reasonable; the Appellate Division has reversed awards and remitted claims in cases of refusal of operation: for hernia, Palloni v. Brooklyn-Manhattan Transit Corp., 215 App. Div. 634; 149 S. B. 128; Daugherty v. Port, 214 App. Div. 745; 140 S. B. 99; for restoration of binocular vision: Egan v. Genesee Bridge Co., 215 App. Div. 733; 149 S. B. 97; renewed award affirmed, 221 App. Div. 826; and for improvement of wounded limbs: Elliott v. Morgan, 214 App. Div. 745; 140 S. B. 114; Salvato v. O'Brien, 214 App. Div. 750; 140 S. B. 114; Kayrod v. Siegner, 215 App. Div. 743; 149 S. B. 130; Kozorral v. International Paper Co., 217 App. Div. 809; renewed award affirmed, 222 App. Div. 785; 156 S. B. 152; and in refusing to return to a hospital: Audi v. N. Y. Central R. R. Co., 212 App. Div. 846; 215 App. Div. 742; 140 S. B. 114. On the other hand it has affirmed awards in numerous cases of appeal based upon the plea of unreasonable refusal to submit to operations, for example, cases cited in 156 S. B. 152; 161 S. B. 93; and 185 S. B. 28.

Refusal to submit to operative procedure figured in Cartenuto v. McConnell & Co., 254 App. Div. 612; 204 S. B. 277, where the Industrial Board's findings "that claimant's refusal to permit amputation of foot was not unreasonable" was affirmed on ground that this was a question of fact to be determined by the Board and in Franceschetti v. Solvay Process Co., 254 App. Div. 717; 204 S. B. 360, where award was made to claimant for sympathetic ophthalmia in uninjured eye upon a finding that his refusal to permit enucleation of injured eye was not unreasonable inasmuch as the danger to the uninjured eye was not made known to him. See also Raynello v. Scott Bros., 241 App. Div. 895; 260 App. Div. 977.

Replacement of natural teeth. Replacement of natural teeth injured by accident by artificial teeth is a proper medical expense: Belmont v. Paramount Publix Corp., 246 App. Div. 661; 204 S. F. 227; but not replacement of artificial teeth injured by accident: Fromowitz v. North American Knitting Mills, 214 App. Div. 827; 140 S. B. 130.

Self insurers—liability of deposits for medical expenses. Concerning liability of deposits made by self-insurers under subd. 3 of § 50, below, for medical expenses, see Opinion of Attorney-General, March 12, 1934.

Skin graft—liability for resultant infection to donor. The Appellate Division, with opinion, reversed hospital award for an aunt who gave skin for grafting to her injured nephew and contracted illness in sequence: Rutledge v. Interboro R. T. Co., 230 App. Div. 553; 185 S. B. 34.

Travelling expenses in connection with medical treatment. The Appellate Division affirmed an award covering an injured employee's travelling expenses to consult a specialist: Smylie v. Stony Wold Sanitarium, 208 App. Div. 823; 133 S. B. 66; and awards covering taxi hire: Cresbin v. Feldman, 235 App. Div 116; 185 S. B. 24; Welsh v. Vanleigh Furniture Co., 236 App. Div. 864; 11 Ind. Bul. 447.

§ 14. **Weekly wages basis of compensation.** Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined as follows:

1. If the injured employee shall have worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed;

2. If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed;

3. If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual [1]average earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment, [2]or other employment as defined in this chapter, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident, [3]provided, however, his average annual earnings shall consist of not less than two hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed, [4]further provided, however, that if the injured employee shall have been in the military or naval service of the United States or of the state of New York within twelve months prior to his injury, and his average annual earnings cannot be fairly determined under sub-

divisions one and two, then the average annual earnings shall be determined by multiplying his average daily wage during the days so employed by not less than two hundred and forty; [*Subd.* 3 *am'd by L.* 1928, *ch.* 754; *L.* 1937, *ch.* 925; *L.* 1941, *ch.* 277.]

[1] Word "average" inserted by L. 1928, ch. 754.

[2] Words "or other employment as defined in this chapter" inserted by L. 1928, ch. 754.

[3] Words "provided . . . when so employed" added by L. 1937, ch. 925.

[4] Remainder of subdivision added by L. 1941, ch. 277.

4. The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings;

5. If it be established that the injured employee was a minor when injured, and that under normal conditions his wages would be expected to increase, [1]that fact may be considered in arriving at his average weekly wages. [*Subd.* 5 *am'd by L.* 1937, *ch.* 925.]

[1] Word "that" substituted for word "the" by L. 1937, ch. 925.

Wages are defined by § 2, subd. 9; for other wage provisions see §§ 15–17, 22, 39, 54, subd. 6, §§ 95, 96, 112. See especially the note under paragraph "v" of § 15, subd. 3.

Opinions and decisions relative to this section are listed topically in 162 S. B. 142–147, 279; 185 S. B. 186–233; and 204 S. B. 245–271.

This section should be read in connection with subd. 6 of § 15, maximum and minimum disability compensation, and subd. 5 of § 16, maximum death benefits.

METHODS OF DETERMINING WAGE BASIS.

The context of this section indicates that the Department of Labor may use the method of its subd. 2 only when subd. 1 is not applicable and the method of its subd. 3 only when neither subd. 1 nor subd. 2 is applicable. Subds. 1 and 2 are silent as to method of ascertaining "average daily wage or salary;" they use the term "earned" when subd. 3 uses the term "earning capacity."

Subds. 1 and 2 are applicable only when the employment has been pursued at the place of the accident or in the neighborhood thereof "substantially the whole of the year immediately preceding." Two hundred and seventy working days are minimum for substantially the whole of the year, according to ruling of the Industrial Board based upon Leesman v. Drew Bros., 182 App. Div. 907; 95 S. B. 145; and Belliamo v. Marlin-Rockwell Corp., 215 App. Div. 845, 149 S. B. 201.

Subds. 1 and 2 are applicable to a business operated six days, but not to a business operated five or other number less than six, or to a business operated seven days per week: Belliamo v. Marlin-Rockwell Corp., 215 App. Div. 845; 149 S. B. 201; Limone v. Atlas Can Co., 202 App. Div. 862; 114 S. B. 89; Remo v. Skenandoa Cotton Co., 189 App. Div. 367; 98 S. B. 36; Shaw v. American Body Co., 189 App. Div. 365; 98 S. B. 37; Prentice v. N. Y. State Rys., 181 App. Div. 144; 95 S. B. 143. Saturday half-holiday counts as a full day: Roskie v. Amsterdam Yarn Mills, 191 App. Div. 649; 98 S. B. 42; Marturano v. Rome Wire Co., 205 App. Div. 859; 123 S. B. 44.

Subdivision 1. Subd. 1 excludes subd. 2 when the injured employee has himself worked in the employment substantially the whole of the year immediately preceding his accident: Kenyon v. Kenyon, 236 App. Div. 181; 185 S. B. 187. This is true whether the employment has been with "the same employer or not:" Franklin v. Hinkle Iron Co., 256 N. Y. Rep. 563; 185 S. B. 187; Keenly v. N. Y. University & Bellevue Medical College, 229 App. Div. 819; 185 S. B. 188; Rahm v. Rochester, Lockport & Buffalo R. R. Co., 5 Ind. Bul. 258; 217

App. Div. 711; 149 S. B. 197, 198; Marshall v. Hunt, 230 App. Div. 797; 185 S. B. 188. In the Keenly and Rahm cases employment by two different employers ran contemporaneously.

Subdivision 2. In the following cases the courts held subd. 2 to be applicable: Krajewski v. Eagle Pencil Co., 272 N. Y. Rep. 537; 204 S. B. 248; Williams v. Harrison & Meyer, 272 N. Y. Rep. 538; 204 S. B. 249; Brown v. Boon & Sullivan, 272 N. Y. Rep. 438; 204 S. B. 246; Lally v. Driscoll Co., 242 App. Div. 304; 266 N. Y. Rep. 627; 185 S. B. 189; Marshall v. Oswego County Council Boy Scouts of America, 244 App. Div. 821; 268 N. Y. Rep. 650; 185 S. B. 211; 204 S. B. 249; Wall v. Robins Conveying Belt Co., 268 N. Y. Rep. 652; 185 S. B. 194; 14 Ind. Bul. 281; Kahl v. Sinclair Refining Co., 274 N. Y. Rep. 516; 204 S. B. 247; Fredenberg v. Empire U. Rys., 168 App. Div. 618; 81 S. B. 331, 332; Minniece v. Terry Bros. Co., 223 N. Y. Rep. 570; 95 S. B. 149; Mackin v. Press Publishing Co., 209 App. Div. 252; 133 S. B. 188; Aronstein v. Trojan Hat Co., 245 App. Div. 151; 185 S. B. 192; Scott v. Town of Canton, 245 App. Div. 113; 185 S. B. 219; Hersch v. Smith, 217 App. Div. 703; 149 S. B. 197; Clayton v. Walker-Hayes, 219 App. Div. 848; 156 S. B. 207; Kapler v. Camp Taghconic, 222 App. Div. 785; 161 S. B. 154; Foster v. Rochester Fruit & Vegetable Co., 226 App. Div. 709; 185 S. B. 193; Flinnegan v. Catholic Charities, 236 App. Div. 767; 185 S. B. 194; Wood v. Three Arts Club, 236 App. Div. 770; 11 Ind. Bul. 391; Eisenberg v. Erie R. R. Co., 240 App. Div. 790; 185 S. B. 191.

A roofer sustained fatal injuries in the course of his employment. He had worked 236 days during the year preceding his accident and had been made foreman eleven weeks prior to his death at an increase in salary. The Industrial Board, pursuant to subdivision 2 of this section, based an award of death benefits on the payrolls of roofing foremen doing the same or similar work, in the same community, for the year prior to the accident. The carrier contended (1) that the compared employees were not of the same class because they received a higher hourly rate than deceased and (2) that subdivision 3 should have been used in determining the rate inasmuch as roofing was seasonal in nature. Award was affirmed. Price v. Bison Roofing & Sheet Metal Corp., 260 App. Div. 167.

A mechanic worked only five weeks prior to sustaining injuries in course of his work. He was a six day worker and earned seventy cents per hour. Award of compensation based upon the payroll of another mechanic who had worked regularly for the same employer and earned first seventy and later eighty cents per hour during the year prior to claimant's accident was affirmed. Quicksall v. Hubbard & Floyd, Inc., 260 App. Div. 821.

The court held subd. 2 to be inapplicable because the compared or substituted employee was not of the same class: Deverso v. Parsons, 221 App. Div. 622; 156 S. B. 210; Robillard v. Macy & Co., 219 App. Div. 847; 156 S. B. 211; Orlando v. Snider Packing Corp., 230 App. Div. 557; 185 S. B. 220; Barlog v. Water Comrs. of Dunkirk, 239 App. Div. 225; 185 S. B. 214; and was not "in the same or in a similar employment": Ruppert v. Plattdeutsche Volksfest Verein, 263 N. Y. 338; 185 S. B. 209, 210; Kraushmar v. Comstock Co., 244 App. Div. 465; 185 S. B. 215; Moquin v. Glens Falls Hotel Corp., 245 App. Div. 56; 185 S. B. 216; King v. Burlingame, 242 App. Div. 499; 185 S. B. 213; Phillips v. N. Y. Trap Rock Co., 245 App. Div. 353; 204 S. B. 255; Kaplan v. Camp Taghconic, 215 App. Div. 51; 149 S. B. 198.

A truck driver in the employ of a truckman hauled telephone poles at the basic rate of 50 cents an hour. During the year preceding his accident he worked only 187 days, earning a total of $479.85. The Industrial Board, using subd. 2, based said truck driver's compensation rate on the earnings of an employee engaged in trucking for a public utility corporation at the basic rate of 81 cents an hour who earned $1,917.25 in the year preceding the accident. Award reversed, with statement that, "This rate was based on the earnings of an employee engaged in a different type of trucking * * *. The rate fixed is not in compliance with § 14, Workmen's Compensation Law." Richeal v. Eckert, 262 App. Div. 788.

Subdivision 3. Subd. 3 governs where the working days and hours are irregular or where the number of working days per week is other than six (Remmert and other cases, infra); also where the employment is seasonal: as bricklaying, Littler v. Fuller Co., 223 N. Y. 369; 95 S. B. 147; Labish v. De Noyelles Brick Co., 231 App. Div. 484; 10 Ind. Bul. 125; water transportation, Rooney v. Great Lakes Transit Corp., 191 App. Div. 10; 98 S. B. 38; coaster railwaying, Gruber v. Kramer Amusement Corp., 207 App. Div. 364; 123 S. B. 41, highway construction, Kittle v. Town of Kinderhook, 214 App. Div. 345; 217 App. Div. 809; 244 N. Y. Rep. 612; 140 S. B. 37; 156 S. B. 209, canning, Darby v. N. Y. Canners Co., 215 App. Div. 733; 149 S. B. 200, picking fruits and vegetables, Deverso v. Parsons, 221 App. Div. 622; 156 S. B. 210, ice harvesting, Dingee v. Dairymen's League Co-operative Ass'n, 219 App. Div. 846; 156 S. B. 212; Blatchley v. Dairymen's League Co-operative Ass'n., 225 App. Div. 167; 161 S. B. 155, structural steel work, Geroux v. McClintic-Marshall Co., 225 App. Div. 434; 161 S. B. 158, and summer boarding house service, Kadison v. Gottlieb, 226 App. Div. 700; 161 S. B. 157. But circumstances may take these occupations out of the seasonal class as in the case of a highway department carrying on winter work, Hogan v. Onondaga County, 221 App. Div. 636; 156 S. B. 207; and a cannery operating the year round, Freeberg v. Delaney Co., 215 App. Div. 849; 149 S. B. 200. Summer camp employment together with winter work in a community center figured in Kapler v. Camp Taghconic, 215 App. Div. 51; 149 S. B. 198; 222 App. Div. 785; 161 S. B. 154, and piece workers' employment in Cohen v. Rothstein & Pitofsky, 9 S. D. R. 302; 176 App. Div. 35; 95 S. B. 141; Shaw v. American Body Co., 189 App. Div. 365; 98 S. B. 37; and Fox v. Bachnor Bros. Co., 191 App. Div. 706; 98 S. B. 40. Regard under subd. 3 to the earnings of other employees figured in Hall v. Nell Bros. & Kern, 272 N. Y. Rep. 540; 204 S. B. 254; Stendora v. Schneider & Sons, 272 N. Y. Rep. 539; 204 S. B. 254; and Dicaro v. Fitzgibbon, 249 App. Div. 38; 204 S. B. 257. The Appellate Division held that compensation of two employees of an iron foundry should be computed according to subd. 3 because no proof permitted compensation according to subd. 2: McDonald and Testo v. Burden Iron Co., 206 App. Div. 571; 211 App. Div. 219; 123 S. B. 39; 140 S. B. 180.

The courts held that an employee, who worked six days a week during the first nine months and from one to three days a week during the last three months of the year immediately preceding his accident, worked substantially the whole of the year, but directed that his average weekly wages should be determined by use of subd. 3 instead of subd. 1 or subd. 2: Remmert v. Weidenmeyer, 237 App. Div. 147; 262 N. Y. Rep. 534; 185 S. B. 197.

The Appellate Division reversed award because the compared or substituted employee was not working "in the same or a neighboring" place or locality: Orlando v. Snider Packing Corp., 250 App. Div. 557; 185 S. B. 220. The Industrial Board has interpreted the word "neighboring" to mean a place of work within reasonable traveling distance of the injured employee's home.

The Appellate Division reversed award under subd. 2 where the wages of an injured janitress already earned and expected to be earned where shown: Sorenson v. Queensboro Corp., 249 App. Div. 359; 204 S. B. 252.

The amendment of subd. 3 inserting the words "or other employment as defined in this chapter" is interpreted in Damm v. Schreier Contracting Co., 235 App. Div. 478; 185 S. B. 202; and Clevely v. Upson Co., 237 App. Div. 671; 185 S. B. 204; see also Straf v. Hotel Rosemont, 235 App. Div. 883; 11 Ind. Bul. 273: it is not retroactive: Blatchley v. Dairymen's League Co-operative Ass'n., 225 App. Div. 167; 161 S. B. 155; the relation—prior to such amendment—of subd. 3 of this section to the proviso of subd. 6 of § 15 for receipt of "full weekly wages" was considered in Kadison v. Gottlieb, 226 App. Div. 700; 161 S. B. 157; Dingee v. Dairymen's League, 219 App. Div. 846; 156 S. B. 211, 212; Fox v. Bachnor Bros., 191 App. Div. 706; 98 S. B. 40; Morey v. Worden, 2 S. D. R. 494; 81 S. B. 328.

Decedent, an ironworker's helper at time of accident had been employed by the employer herein for twenty-one working days. The work was seasonal. During the year prior to his death decedent had also performed carpentry work

and had earned the sum of $1,050. Carrier contended that in determining the decedent's average weekly wage under subdivision 3, his earnings in employment other than that in which he was working when injured could not be counted. The Industrial Board overruled this contention. Decision upheld. Heffer v. Sullivan Dry Dock & Repair Co., 262 App. Div. 786.

The Appellate Division favors ascertainment of average weekly wage under subd. 3 by dividing actual aggregate earnings for the year preceding the accident by fifty-two: Prentice v. N. Y. State Rys., 181 App. Div. 144; 95 S. B. 143; Remo v. Skenandoa Cotton Co. 189 App. Div. 367; 98 S. B. 36; Limone v. Atlas Can Co., 202 App. Div. 862; 114 S. B. 89; Belliamo v. Marlin-Rockwell Corp., 215 App. Div. 845; 149 S. B. 201.

The Appellate Division approved of the multiplier 332, instead of 300, for a seven day week worker: Prentice v. N. Y. State Rys., 181 App. Div. 144; 95 S. B. 143; but excluded Sunday as a day of disability in the absence of evidence that claimants worked seven days per week: Beers v. Beers Bros. 180 App. Div. 760; 95 S. B. 148; Kousch v. Ellis, 195 App. Div. 914; 114 S. B. 89.

Where carpenter who earned $5.00 per day and sustained fatal injuries during the second week of his employment had worked on a W.P.A. project and done odd jobs during the year prior to his accident, an award of death benefits based on 200 times his daily wage of $5.00 was affirmed: Ingvaldsen v. Johnson, 258 App. Div. 1011; 204 S. B. 259.

Subdivision 4. A seven-day worker was killed in the course of his employment. The Industrial Board computed his average weekly wage by taking one-fifty-second part of his actual annual earnings. Award of death benefits based thereon was affirmed. Kelly v. Interborough R. T. Co., 251 App. Div. 763; 204 S. B. 259.

The wage rate in the case of a casual worker who had not worked substantially the whole of the year preceding his injury was computed by dividing the total annual wages of a co-employee, who had worked for over forty weeks, by forty. Award based thereon was reversed, with statement that this method of computation did not comply with this subdivision. Willis v. Beard's Erie Basin, 245 App. Div. 888; 204 S. B. 260.

Subdivision 5. Minor's expectation of wage increase is interpreted by court opinions in Kilberg v. Vitch, 171 App. Div. 89; 81 S. B. 330; Carkey v. Island Paper Co., 177 App. Div. 73; 95 S. B. 158; Barringer v. Clark, 184 App. Div. 695; 95 S. B. 159; Ide v. Faul & Timmins, 179 App. Div. 567; 95 S. B. 159; Markowitz v. Watter's Laboratories, 191 App. Div. 267; 98 S. B. 46; Mackin v. Press Publishing Co., 209 App. Div. 252; 133 S. B. 188; Szmuda v. Kent Bag Co., 214 App. Div. 341; 140 S. B. 185; Kerchik v. La Fontaine Novelty Co., 225 App. Div. 437; 161 S. B. 163; Gruber v. Kramer Amusement Corp., 207 App. Div. 564; 123 S. B. 41; Zypitz v. St. Francis Hospital, 231 App. Div. 768; 185 S. B. 224; Mosher v. Carleton, 207 App. Div. 84; 123 S. B. 44; Foyt v. Daigler, 236 App. Div. 420; 185 S. B. 223; Smith v. Kosters Bakery, 247 App. Div. 434; 272 N. Y. Rep. 543; 204 S. B. 266; Lucas v. Woolworth Co., 245 App. Div. 900; 204 S. B. 268; Frankel v. Gellens & Weiss, 253 App. Div. 849; 204 S. B. 267; Natoli v. Bethlehem Steel Co., 257 App. Div. 1081; 284 N. Y. Rep. 610; 204 S. B. 268.

The expectation of increase should not be revised because of variations in wage rates: Lerner v. Jakwall Embroidery Co., 203 App. Div. 381; 123 S. B. 46. Amendments of § 22, below, permit revisory increase of paid awards to cover expectation.

Minor who sustained total loss of vision of the right eye was totally disabled for sixty weeks. The Industrial Board determined his wage expectancy rate pursuant to subdivision 5 and ruled that the compensation rate for the period of temporary total disability and the period of protracted temporary total disability should be fixed at the expectancy rate. Ruling upheld, with statement that, "The protracted temporary total disability falls within the permanent partial disability classification and is subject to the terms of subdivision 5 of section 14." Polsky v. Blackman Plumbing Supply Co., Inc., 262 App. Div. 783. See 162 S. B. 146, 147; 185 S. B. 221-224; and 204 S. B. 266-270.

General Notes on § 14

Fact findings—finality. Determination of the average weekly wages is not reviewable by the courts, if supported by any evidence: Fairchild v. Pa. R. R. Co., 170 App. Div. 135; 81 S. B. 179; but the commission must base its award upon the actual facts: Cohen v. Rothstein & Pitofsky, 176 App. Div. 35; 95 S. B. 141; Vaughn v. Barnet Leather Co., 191 App. Div. 652; 98 S. B. 44.

Increase of wages within year preceding injury. Where an employee's wages in the same kind of work varied during the year preceding his accident, the aggregate of them for the year was the basis: Duffy v. Great Atlantic & Pacific Tea Co., 228 App. Div. 740; 9 Ind. Bul. 112; Cameron v. Acheson Graphite Co., 14 S. D. R. 683, 3 Bul. 77; 95 S. B. 151.

Joint earnings. Where husband and wife were employed jointly in domestic service and the wife sustained fatal injuries in the course of such employment, the Industrial Board awarded death benefits to her dependent husband based on a finding that she had earned 75 per cent of their joint wages: Bader v. Reisman, 257 App. Div. 1086; 204 S. B. 194.

Stipulation as to wage rate. Wages may be determined by stipulation or agreement between the parties: Elderkin v. Yates Lumber Co., 218 App. Div. 792; 228 App. Div. 868; 185 S. B. 233; also minor's wage expectation: Szwedo v. Scala Packing Co., 231 App. Div. 782; 185 S. B. 233. See also Kutz v. Richell Realty Co., 245 App. Div. 886; 204 S. B. 260.

Two or more employers as wage source. The Court of Appeals affirmed award to a dietitian injured while serving a church dinner based on her combined wages as a high school dietitian and as an assistant housekeeper at the church: McDowell v. Flatbush Congregational Church, 252 App. Div. 799; 277 N. Y. Rep. 536; 204 S. B. 262.

Where an employee was day laborer and night watchman within a twenty-four hour period his combined pay for the two occupations was the basis of award: Bauer v. Fisher & Voorheis, 217 App. Div. 702; 149 S. B. 199.

Where injured janitor also worked at barbering for different employer within twenty-four hour period, his janitorial earnings alone were used in fixing his compensation rate: Birch v. Budd, 256 App. Div. 53; 204 S. B. 107.

Year immediately preceding injury. In determining the wage basis of compensation the Department of Labor may use only the year immediately preceding the accident: Budowski v. Atlas Steel Co., 237 App. Div. 667; 185 S. B. 206; Hebert v. Dent Furniture Co., 240 App. Div. 741; 262 N. Y. Rep. 675; 185 S. B. 198.

§ 14-a. Double compensation and death benefits for minors illegally employed.

1. Compensation and death benefits as provided in this article shall be double the amount otherwise payable if the injured [1]employee at the time of the accident is a minor under eighteen years of age employed, permitted or suffered to work in violation of any provision of the labor law [2]or in violation of any rule heretofore or hereafter adopted by the board pursuant to subdivision eleven of section one hundred and forty-six of said law.

[1] Spelling "employee" substituted for spelling "employe" by L. 1935, ch. 603.
[2] Rest of subdivision added by L. 1935, ch. 603.

This subdivision should be read in connection with § 14, subd. 5, awards to minors at adult rates, § 15, subd. 6, maximum and minimum disability compensation, and § 16, subd. 5, maximum death benefits.

For prohibited employments of minors see especially Labor Law, §§ 130, 131, 146, 383; Industrial Code, Rule 408; subd. 7 of § 2 of the Labor Law defines "Employed" to include "permitted or suffered to work."

Pursuant to subd. 11 of § 146 of the Labor Law, the Industrial Board has prohibited the operation of unguarded machines by minors under eighteen years of age: Code Bulletin No. 19, Rules 921, 922.

2. The employer alone and not the insurance carrier shall be liable for the increased compensation or increased death benefits provided for by this section. Any provision in an insurance policy undertaking to relieve an employer from such increased liability shall be void.

3. A minor over [1]eighteen years of age may apply for a certificate of age to the superintendent of schools or to an employment certificating officer. Upon such application a certificate of age, signed by the officer issuing it and containing the name, date of birth, address and signature of the applicant shall be issued to him if he furnishes [2]evidence that he is over [1]eighteen years of age [3]such as is required for the issuance of an employment certificate. Such a certificate of age shall be conclusive evidence for an employer that the minor has reached the age certified to therein, and the provisions of this section shall not apply to the employer of such minor while the minor is engaged in employment lawful for the age and sex as certified to in the certificate of age. [*Section 14-a added by L.* 1923, *ch.* 572; *am'd by L.* 1935, *ch.* 603 *and L.* 1937, *ch.* 565.]

[1] Word "eighteen" substituted for word "sixteen" by L. 1937, ch. 565.
[2] Word "such" eliminated by L. 1937, ch. 565.
[3] Word "such" inserted by L. 1937, ch. 565.

Constitutionality. For constitutionality of this § 14-a, see Kociolowicz v. Tonawanda Corrugated Box Co., Inc., 252 App. Div. 716; 204 S. B. 275.

Exclusiveness. The Workmen's Compensation Law exclusively governs injury to employees employed in violation of law: Noreen v. Vogel & Bros., 231 N. Y. 317; 106 S. B. 173.

Labor Law violations. Awards under this section were affirmed where minors were employed in violation of:

Labor Law, § 130, employment of children under sixteen: Moreno v. Halstead Canning Co., 258 App. Div. 832; 204 S. B. 9.

Labor Law, § 131, employment without certificate: Braiter v. Addie Co., Inc., 256 App. Div. 882, 282 N. Y. 326; 204 S. B. 271; Frankel v. Gellens & Weiss, 253 App. Div. 849; 204 S. B. 267; Graf v. Silver Creek Preserving Corp., 257 App. Div. 1090; 204 S. B. 272; Warner v. Wendt's Ice Cream Co., 256 App. Div. 1017; 204 S. B. 273.

Labor Law, § 146, Rule 922 of Industrial Code, illegal operation of power press: Mayo v. Special Machine Tool Engineering Works, Inc., 256 App. Div. 863, 204 S. B. 273.

Labor Law, § 146, Subd. 7, cleaning machinery in motion: Podola v. Crescent Box Mfg. Corp., 256 App. Div. 1016; 204 S. B. 274.

Labor Law, § 171, Subd. 2, employment between twelve midnight and six a. m.: Stachowiak v. O'Rourke Baking Co., Inc., 253 App. Div. 734; 280 N. Y. 338; 204 S. B. 423.

Falsification of age. Claimant's false representation of age resulting in his employment without required certificate held not a bar to double compensation award: Braiter v. Addie Co., Inc., 256 App. Div. 882; 282 N. Y. 326.

Seventeen year old minor hired before minimum age was increased to eighteen and injured shortly thereafter. Minor, seventeen years of age, had been hired prior to September 1, 1936, on which date the minimum age for employing minors without certificates was increased from seventeen to eighteen

years. Said minor was fatally injured on October 19, 1936. Double compensation award was affirmed, with statement that, "Although decedent may have been employed prior to the effective date of the statute, nevertheless there was a violation thereof if his employment was continued thereafter while he was under eighteen years of age." Joseph v. Sterilek Co., Inc., 260 App. Div. 969; 285 N. Y. Rep. ——, May 22, 1941.

Restaurant defined. The Labor Law's regulations governing employment in restaurants apply to club house restaurants and accordingly claimants were entitled to double compensation in Lewandowski v. Onondaga Golf & Country Club, 266 N. Y. Rep. 628; 185 S. B. 149; Opinion of Attorney-General, January 2, 1935.

Other cases. See 162 S. B. 125, 126; 185 S. B. 151-157; and 204 S. B. 271-276. See also Hall v. Chatham Electric Light H. & P. Co., 220 App. Div. 18; 156 S. B. 204.

§ 15. **Schedule in case of disability.** The following schedule of compensation is hereby established:

1. **Permanent total** [1] **disability.** In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts. [*Subd.* 1 *am'd by L.* 1922, *ch.* 615.]

[1] Words "Permanent total" substituted for words "Total permanent" by L. 1922, ch. 615.

For additional limitation of amount compare § 15, subd. 6; for penalty accruing to employee, § 25; for additional compensation during rehabilitation, § 15, subd. 9.

The compensation of an employee who loses any two of the members named in this section by different accidents occuring at different times, *e. g.*, the loss of one hand in 1909 and the loss of the other in 1916, is determined by subd. 8 of this section.

Disfigurement in connection with permanent total disability. Award for disfigurement may not be added to award for permanent total disability: Clark v. Hayes, 207 App. Div. 560; 238 N. Y. Rep. 553; 123 S. B. 26. Compare Reinhardt v. Grasselli Chemical Co., 33 S. D. R. 464; 34 S. D. R. 566.

Injury confined to leg. A finding of permanent total disability was affirmed where claimant's injury, confined to foot and leg, wholly incapacitated him: Cartenuto v. McConnell & Co., 254 App. Div. 612; 204 S. B. 277.

Maximum compensation. The Commission commuted an award for permanent total disability to $5,000; the employee recovered, went to work and incurred another accident; the Board thereupon, awarded him compensation for temporary total disability; the courts approved the Board's action: Berner v. Caruso & Wolpert, Case No. 1010170; 201 App. Div. 866; 223 N. Y. Rep. 614; 114 S. B. 19. Compare Van Tassel v. Basic Refractories Corp., 5 Ind. Bul. 166; 216 App. Div. 774; 149 S. B. 138.

Other cases. For references upon the question, what constitutes permanent total disability, see 162 S. B. 112; 185 S. B. 53; also Collins v. Spoor Lasher

Co., 236 App. Div. 867; 11 Ind. Bul. 441; Shannon v. De Grasse Paper Co., 239 App. Div. 868; 12 Ind. Bul. 170; Williams v. Imperial Property Co., 240 App. Div. 741; 12 Ind. Bul. 196; Walsh v. Dollard, 241 App. Div. 782; 13 Ind. Bul. 86. On June 21, 1934, the State Fund and Walsh agreed upon a lump sum of $6,000 in settlement of his case.

2. **Temporary total disability.** In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, but not in excess of [1]five thousand dollars, except as otherwise provided in this chapter. [*Subd. 2 am'd by L. 1927, ch. 555.*]

[1] Words "five thousand" substituted for words "three thousand five hundred" by L. 1927, ch. 555.

For additional limitation of amount compare § 15, subd. 6; for penalty accruing to employee, § 25; for additional compensation for disfigurement, § 15, subd. 3-t.

This subdivision should be read in connection with subd. 4-a below, as added by L. 1924, ch. 500. Before the enactment of subd. 4-a, the Court of Appeals had held that, if an accident involved both temporary total and permanent partial disability, award could be made for but one of the two classes of injury: Marhoffer v. Marhoffer, 220 N. Y. 543; 95 S. B. 35. This decision invalidated numerous consecutive awards made previously; concurrent awards for the two classes of disability had been declared not within the intent of the law in Fredenberg v. Empire U. Rys., 168 App. Div. 618; 170 App. Div. 942; 81 S. B. 277. Two concurrent awards may be made, however, in cases involving facial or head disfigurement: Erickson v. Preuss, 223 N. Y. 365; 95 S. B. 73; Sweeting v. American Knife Co., 226 N. Y. 199; 250 U. S. 596; 95 S. B. 75; 97 S. B. 15; Biane v. N. Y. Central R. R. Co., 226 N. Y. 586; 250 U. S. 596; 95 S. B. 74; 97 S. B. 15.

Maximum compensation. Relative to the maximum payment limit of this subdivision, $3,500 until Oct. 1, 1927, and $5,000 thereafter, see Stoddard v. Hammond Steel Co., 218 App. Div. 804; 156 S. B. 187; 214 App. Div. 825; 140 S. B. 126; Weighton v. Austin Co., 205 App. Div. 159; 123 S. B. 14; Clark v. Lewis Wrecking Co., 214 App. Div. 826; 140 S. B. 126; Crockett v. Coppins & Sons, 202 App. Div. 535; 114 S. B. 18; and Strzyckowski v. American 3 Way-Luxfer Prism Co., 230 App. Div. 632; 185 S. B. 90.

A claimant having received compensation for temporary disability in the amount of $5,000, the carrier opposed further award contending that she had received the maximum amount permitted under the law. The Industrial Board, overruling carrier's contention, held that the $5,000 maximum applied only to temporary total disability and that in addition thereto an award could be made under § 15, subd. 5, for a period of temporary partial disability not to exceed $4,000, or a total of $9,000. Decision upheld with statement that upon proof of change in claimant's condition, the Board could reclassify her disability from temporary total to temporary partial and that under such reclassification she could receive an additional $4,000. Laser v. Gilmore Cafeteria, Inc., 261 App. Div. 737.

Substitute hired by injured employee. A totally disabled employee may provide a substitute; for note relative thereto and relative to reimbursement rights of an employer who makes payments to his disabled employee, see below, page 180.

Termination of temporary total disability—what constitutes. The fixing of the date of the termination of temporary total disability frequently causes controversy. The injured employee may be either unable to procure employment

or unwilling to go to work again. The employer may charge that he is malingering. The Commission's attitude relative to malingering is set forth in 1 Bul. No. 9, pp. 16, 17, 19, 20, and in Glidder v. Haliver, 6 S. D. R. 366; 81 S. B. 397. For references upon termination see 162 S. B. 113, 185 S. B. 50–53.

3. **Permanent partial disability.*** In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in [1]this subdivision, as follows:

[1] Words "this subdivision" substituted for words "the schedule" by L. 1922, ch. 615.

For additional limitation of amount compare § 15, subd. 6; for penalty accruing to employee, § 25; for additional compensation for disfigurement, par. "t" of this subdivision; for additional compensation during rehabilitation, § 15, subd. 9.

Member lost	Number of weeks' compensation	Member lost	Number of weeks' compensation
a. Arm	312	g. First finger	46
b. Leg	288	h. Great toe	38
c. Hand	244	i. Second finger	30
d. Foot	205	j. Third finger	25
e. Eye[1]	160	k. Toe other than great toe	16
f. Thumb[2]	75	l. Fourth finger	15

[1] Figure "160" substituted for figure "128" as number of weeks' compensation for loss of an eye by L. 1924, ch. 317.

[2] Figure "75" substituted for figure "60" as number of weeks' compensation for loss of a thumb by L. 1924, ch. 320.

Loss of a limb, eye or digit described in paragraphs "a" to "l" inclusive, is interpreted by paragraphs "n" to "u," following.

m. [1] **Loss of hearing.** Compensation for [2] the complete loss of the hearing of [3]one ear, for sixty weeks, for the loss of hearing of both ears, for one hundred and fifty weeks.

[1] This paragraph "m" inserted by L. 1922, ch. 615.
[2] Words "the complete" inserted by L. 1927, ch. 554.
[3] Words "one . . . hearing of" inserted by L. 1927, ch. 554.

A schedule award was held proper for permanent partial loss of hearing: Bednar v. Ingersoll Rand Co., 249 App. Div. 888; 279 N. Y. 80; 204 S. B. 278; Rowe v. McGovern, 236 App. Div. 866; 254 App. Div. 432; 257 App. Div. 1095; 204 S. B. 280.

Compensation of 50 per cent loss of hearing of each ear should be based on the schedule for loss of hearing of both ears, i. e., 150 weeks, not on schedule for loss of hearing of each ear separately, i. e., 60 weeks: Rowe v. McGovern, 257 App. Div. 1095; 204 S. B. 280.

* Court opinions till August, 1929, interpretative of subdivision 3, are in 81 S. B. 276–306; 95 S. B. 32–38, 41–84; 98 S. B. 8–15; 114 S. B. 29–61; 123 S. B. 23–30; 133 S. B. 175–183; 140 S. B. 130–153; 149 S. B. 142–166; 156 S. B. 165–186; 161 S. B. 107–131; 185 S. B. 53–92. See also 162 S. B. 114–125. L. 1922, ch. 615, redrafted this subdivision 3 with some substantive changes indicated by the notes to its various paragraphs.

n. **Phalanges.** Compensation for the loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

The amputation of "substantially all" of the first phalange of a finger has been held to constitute loss of half of the finger: Matter of Petrie, 215 N. Y. 335; 81 S. B. 290; Forbes v. Evening Mail, 194 App. Div. 563; 114 S. B. 41; loss of a phalange and a half does not constitute loss of a finger: Bosley v. Mason & Sons. Case No. 5301269; 211 App. Div. 822; 140 S. B. 137; Baron v. National Metal S. & S. Co., 182 App. Div. 284; 95 S. B. 47; ankylosis of the joint of a finger need not constitute loss of one-half of the finger: Antonacci v. N. Y. Multi Color Copying Co., 194 App. Div. 933; 114 S. B. 42; Stringham v. Ashton, 194 App. Div. 853; 114 S. B. 43. See also Mockler v. Hawkes, 173 App. Div. 333; 81 S. B. 291; Geiger v. Gotham Can Co., 9 S. D. R. 249; 177 App. Div. 29; 95 S. B. 43; Thompson v. Sherwood Shoe Co., 178 App. Div. 319; 95 S. B. 44; Ide v. Faul & Timmins, 179 App. Div. 567; 95 S. B. 45; Tetro v. Superior Printing & Book Co., 185 App. Div. 73; 95 S. B. 45; Ehman v. Koch & Co., 209 App. Div. 777; 133 S. B. 181.

o. **Amputated arm or leg.** Compensation for an arm or a leg if amputated at or above the [1]wrist or ankle, shall be [2]for the proportionate loss of the arm or leg.

[1] Words "wrist or ankle" substituted for words "elbow or the knee" by L. 1928, ch. 754.

[2] Words "for the proportionate loss of the arm or leg" substituted by L. 1928, ch. 754, for words "the same as though for loss of the arm or leg; but, if amputated between the elbow and the wrist, or the knee and the ankle, shall be the same as for loss of a hand or foot."

Compare notes on arm and leg under paragraph "s" below. The amendments of this paragraph by L. 1928, ch. 754, obviate the atrophy decisions in Dowling v. Gates & Co., 253 N. Y. 108; 185 S. B. 69; Stein v. Topal, 217 App. Div. 797; 149 S. B. 156; Tannenbaum v. Estate of Baudouine, 218 App. Div. 792; 156 S. B. 170; Murray v. Subway Co., 221 App. Div. 811; 156 S. B. 170; and Roular v. Henry Forge & Tool Co., 232 App. Div. 857; 185 S. B. 64.

p. [1] **Binocular vision or per centum of vision.** Compensation for loss of binocular vision or for eighty per centum or more of the vision of an eye shall be the same as for the loss of the eye.

[1] This paragraph "p" redrafted by L. 1922, ch. 615, without substantive change, from provisions inserted by L. 1920, ch. 532.

Paragraph "s" below and notes thereunder govern partial loss of sight. In rare cases involving loss both of binocular vision and direct vision, award is for whichever of the two yields the larger compensation.

Loss of binocular single vision is evaluated on the basis of a normal minimum motor field of fifteen degrees in all directions from the straight forward position. The more important lower half of the motor field is given twice the value of the upper field; that is, loss of the lower field is valued at two-thirds of the loss of binocular single vision and loss of the upper field at one-third. Loss of sectors of the motor field is evaluated in proportion to the area involved, and eighty per cent as one hundred per cent loss.

This paragraph "p" is not retroactive: Arnold v. S. R. Mfg. Co., 208 App. Div. 305; 133 S. B. 175; cases on binocular vision are: Vecchio v. Combined Construction Co., 256 N. Y. Rep. 572; 185 S. B. 66; Gainey v. Nash Motor Corp., 231 App. Div. 768; 185 S. B. 66; Massa v. American Concrete Steel Co., 210 App. Div. 820; 140 S. B. 131; Allenby v. Sinclair, 215 App. Div. 856; 149 S. B. 145; and Clements v. Permutit Co., 217 App. Div. 706; 149 S. B. 145. A case on eighty per centum loss is Przekop v. Ramapo Ajax Corp., 214 App. Div. 512;

140 S. B. 136; see also Bervilacqua v. Clark, 225 App. Div. 190; aff'd., 250 N. Y. Rep. 589; 161 S. B. 184; Ladd v. Foster Bros. Mfg. Co., 205 App. Div. 794; 123 S. B. 24; and Brown v. Brockway Motor Truck Corp., 226 App. Div. 709; 185 S. B. 171.

q. **Two or more digits.** Compensation for loss [1] or loss of use of [2]two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby but shall not exceed the compensation for loss of a hand or foot.

[1] Words "or loss of use" inserted by L. 1935, ch. 661.

[2] Words "two or more digits, or . . . digits," substituted by L. 1922, ch. 615, for words, "more than one finger" and "more than one toe" in corresponding former provisions, as amended by L. 1917, ch. 705.

See subd. 7 of § 15 and notes thereunder.

A schedule award of 20 per cent of the hand based on 50 per cent loss of use of the index finger and 33-1/3 per cent loss of use of the middle finger was affirmed: Mosley v. Sinram Bros., Inc., 251 App. Div. 762; 277 N. Y. Rep. 535; 204 S. B. 282, but see Rounds v. Davis Furniture Co., 250 N. Y. 405; 161 S. B. 121.

Award proportioned to loss of hand is not permissable when each of two accidents causes loss of a finger: Klock v. Rogers, 213 App. Div. 39; 140 S. B. 153; Salgiccioli v. Laur & Mack Construction Co., 217 App. Div. 712; 149 S. B. 155.

For other court opinions and decisions on amputation or ankylosis of digits as proportionate loss of hand or foot under paragraph "q," see 162 S. B. 119, 120, 185 S. B. 66, 67.

History. The amendment effected by L. 1917, ch. 705, may be read in the light of Grammici v. Zinn, 219 N. Y. 322; 81 S. B. 284; Kanzar v. Acorn Mfg. Co., 219 N. Y. 326; 81 S. B. 285; and Modra v. Little, 181 App. Div. 914; 223 N. Y. 452; 95 S. B. 60; and the amendment effected by L. 1922, ch. 615, in the light of Clayton v. Foundation Co., 193 App. Div. 822; 114 S. B. 35. The commission promulgated a schedule of suggested allowances for proportional loss, 98 S. B. 9, 10, concerning the use of which the Appellate Division delivered opinion in Bubniak v. Stewart & Sons, 193 App. Div. 112; 114 S. B. 33.

Interpreting the word "member" in paragraphs "r" and "s" below as including a thumb, a finger or a toe, entire loss of use of a digit from ankylosis or other condition is equivalent to amputation: Rounds v. Davis Furniture Co., 250 N. Y. 405; 161 S. B. 121. Amendment of the "loss of use" paragraph (now paragraph "r") by L. 1916, ch. 622, inserting the words, "thumb, finger, toe or phalange" offset the court decisions in Supple v. Erie R. R. Co., 180 App. Div. 135; 95 S. B. 49; Sugg v. Erie R. R. Co., 180 App. Div. 133; 95 S. B. 50; and Behrens v. Stevens Co., 188 App. Div. 66; 95 S. B. 51.

Applying § 15, subd. 6, below, even before amendment of it by L. 1920, ch. 532, loss under this paragraph "q" was compensable at a maximum of twenty dollars per week: Phonville v. N. Y. & Cuba S. S. Co., 226 N. Y. Rep. 618, 622; 95 S. B. 160.

r. **Total loss of use.** Compensation for permanent [1] total loss of use of a [2]member shall be the same as for loss of the [2]member.

[1] The word "total" was not in the corresponding former provision.

[2] The word "member" replaces the words "hand, arm, foot, leg, eye, thumb, finger, toe or phalange" of the corresponding former provision, as amended by L. 1916, ch. 622.

Loss of use is not determinable solely with view to a particular vocation: Grammici v. Zinn, 219 N. Y. 322; 81 S. B. 284; Modra v. Little, 223 N. Y. 452; 95 S. B. 60; Stringham v. Ashton, 194 App. Div. 853; 114 S. B. 43.

Relative to power of the Board or a Referee to make award in excess of loss testified to by experts, see Clayton v. Foundation Co., 193 App. Div. 822; 114 S. B. 35; and Schemerhorn v. G. E. Co., 195 App. Div. 670; 114 S. B. 38.

Amputation of an arm just below the elbow was held to constitute total loss of use of the arm where the claimant could not use an artificial arm: Schreibner v. Blue Point Oil Corp., 259 App. Div. 772; 204 S. B. 282.

Compensation was awarded for loss of use of the hand because of loss of thumb and three fingers: Donohue v. McKaig-Hatch, Claim No. 57432; 177 App. Div. 938; 223 N. Y. Rep. 572; 95 S. B. 56; because of impairment of thumb and loss of four fingers: Dutcher v. American Express Co., 15 S. D. R. 594; 183 App. Div. 162; 95 S. B. 57; and because of loss of part of palm and four fingers: Cobb v. Library Bureau, 8 S. D. R. 418; 176 App. Div. 91; 221 N. Y. Rep. 574; 95 S. B. 55; Blattner v. Pa Pro Co., 14 S. D. R. 669, 3 Bul. 52; 185 App. Div. 900; 95 S. B. 59; Schrempp v. Talmadge Film Co., Case No. 73179; 188 App. Div. 941; 98 S. B. 10. Compare also: Powers v. Auburn Button Works, 2 Bul. 193; and Hoover v. Vulco Engineering Co., 13 S. D. R. 513.

s. **Partial loss or partial loss of use.** Compensation for permanent partial loss or loss of use of a [1]member may be for proportionate loss or loss of use of the [1]member.

[1] The word "member" replaces the words "hand, arm, foot, leg, eye, thumb, finger, toe or phalange" of the corresponding former provisions as added by L. 1917, ch. 705, and am'd by L. 1920, ch. 533.

Compare paragraphs "n" to "q," above.

Insertion of this paragraph relative to partial loss by L. 1917, ch. 705, and amendment thereof by L. 1920, ch. 533, may be read in the light of the Grammici, Kanzar and Modra decisions cited above under paragraph "q".

For references to arm and leg cases, see 162 S. B. 115, 121, 185 S. B. 564, 572.

Loss of use of a member due to restricted mobility, repeated dislocations, etc. For partial loss of the arm due to loss of mobility at the elbow, see Johnson v. U. S. R. R. Administration, 193 App. Div. 580; 114 S. B. 31; Condon v. American Locomotive Co., 200 App. Div. 881; 114 S. B. 32; Thomas v. Terry, 214 App. Div. 844; 149 S. B. 144; due to loss of mobility at the shoulder, Fuld v. Solomon & Co., 24 S. D. R. 619; 197 App. Div. 911; 114 S. B. 32; Knight v. Furgeson, 198 App. Div. 756; 114 S. B. 49; Maher & Donner Union Coke Corp., 215 App. Div. 854; 149 S. B. 144; and due to repeated dislocations of the shoulder: Maddox v. O'Brien, Terminal Cab Co., and McKee, Smith & Shaw, 236 App. Div. 870; 11 Ind. Bul. 444; for partial loss of the hand due to injury to the ulnar nerve, see Nycz v. Buffalo Body Corp., 221 App. Div. 620; 156 S. B. 181; and due to Colles fracture or other injury to the wrist, Dixon v. Brewer Dry Dock Co., 256 N. Y. Rep. 573; 185 S. B. 95; Schemerhorn v. G. E. Co., 195 App. Div. 670; 114 S. B. 38; McNulty v. Curth & Sons, 195 App. Div. 914; 114 S. B. 40; Burgi v. Hoffman Brewing Co., 200 App. Div. 246; 118 S. B. 65; Ford v. Cochran & Co., 214 App. Div. 837; 149 S. B. 155; Moore v. McDougall-Butler Co., 217 App. Div. 709; 149 S. B. 155; Cosimo v. Carolyn Laundry, 209 App. Div. 842; 214 App. Div. 827; 220 App. Div. 793; 156 S. B. 168; and due to loss of grasping power, Gross v. Reade Corp., 215 App. Div. 632; 149 S. B. 154; Karasik v. Helfand Shoe Co., 217 App. Div. 708; 149 S. B. 155; for partial loss of the foot due to fracture of the ankle, see Theodoropolis v. Federal Restaurant Co., 33 S. D. R. 479; 215 App. Div. 855; 149 S. B. 31. For the subject generally, consult the titles "Hand" and "Foot" in the indexes of the Special Bulletins.

Partial loss of vision—determination. The Court of Appeals, reversing the court below, has upheld the Department's long unchallenged use of the Snellen symbols, 20/20, 20/40, 20/60, etc., as common fractions denoting central vision remaining after accident: De Caprio v. General Electric Co., 244 N. Y. 500; 149 S. B. 150.

In eye tests the Department for ten years took only direct vision into account, using the Snellen method, and disregarding field of vision and binocular vision.

The Appellate Division, with opinion, sustained award on such basis in Turpin v. St. Regis Paper Co., 199 App. Div. 64; 114 S. B. 44, 45; aff'd, 233 N. Y. Rep. 536; but, having considered the question further, reversed similar award, remitting claim, upon two successive appeals in Struble v. Vacuum Oil Co., 210 App. Div. 344; 4 Ind. Bul. 132; 32 S. D. R. 555; 214 App. Div. 844; 133 S. B. 178–180; 140 S. B. 132–137. Thereupon the Department made the same award of sixty per centum loss to Struble a third time but with finding basing it upon all the attributes of vision, as testified to by oculists, and the Appellate Division upon appeal unanimously affirmed the award with opinion, 217 App. Div. 411; 149 S. B. 148. Since that time the Department has considered that loss of direct vision—except in rare cases—automatically and inevitably involves loss of peripheral vision, and vice versa. Compensation for loss of binocular vision is ordinarily covered by paragraph "p", above. In rare cases involving loss of both binocular vision and direct vision, award is for whichever of the two yields the larger compensation.

Earlier court reports and decisions upon proportionate loss of vision are in 95 S. B. 63–73; they have been offset by amendments to the law; the main ground for later appeals has been excessiveness: See 98 S. B. 11–15; 114 S. B. 41–47; 140 S. B. 132; 161 S. B. 118; 185 S. B. 65, 66, 93, 177.

Compensation is not measurable by the amount of vision lost: Bervilacqua v. Clark, 222 App. Div. 784; 225 App. Div. 190; 250 N. Y. Rep. 589; 161 S. B. 184; Truesdell v. Albany Hospital for Incurables, 262 N. Y. Rep. 662; 185 S. B. 94; Hirschman v. Edwards & Son, 259 N. Y. Rep. 644; 185 S. B. 93; Sortino v. Merchants Despatch, 268 N. Y. Rep. 508; 185 S. B. 94; Pyshnack v. Henry Forge & Tool, Inc., 272 N. Y. Rep. 546; 204 S. B. 302; Hobertis v. Columbia Shirt Co., 17 S. D. R. 582; 186 App. Div. 397; 95 S. B. 72; Gordon v. Holbrook, Cabot & Rollins Corp., 17 S. D. R. 588; 3 Bul. 219; 188 App. Div. 941; 95 S. B. 72; Zampiere v. Spencer & Son Corp., 193 App. Div. 920; 114 S. B. 47; Macik v. Luther Mfg. Co., 222 App. Div. 786; 7 Ind. Bul. 99; but compare below, subd. 7, note.

Correcting glasses may reduce or eliminate award for an eye injury: Frings v. Pierce-Arrow Motor Car Co., 182 App. Div. 445; 95 S. B. 70; Smith v. F. & B. Construction Co., 185 App. Div. 51; 95 S. B. 71; Cortina v. Lathrop & Shea Co., 191 App. Div. 928; 98 S. B. 13; Valentine v. Sherwood M. W. Co., 189 App. Div. 410; 98 S. B. 14; McNamara v. McHarg-Barton Co., 200 App. Div. 188; 114 S. B. 46; Reardon v. Ward Baking Co., 198 App. Div. 962; 114 S. B. 46; Bochecchio v. Charnin Contracting Co., 209 App. Div. 619; 133 S. B. 177; but compare Smith v. F. & B. Construction Co., 16 S. D. R. 516; 185 App. Div. 51; 95 S. B. 71; Zimmer v. Seabury & Co., 5 Bul. 106; 194 App. Div. 944; 231 N. Y. Rep. 625; 114 S. B. 46; and Bossler v. Fulton Motor Truck Co., 193 App. Div. 930; 114 S. B. 46.

Partial loss of hearing—compensability. A schedule award for permanent partial loss of hearing was held proper: Bednar v. Ingersoll Rand Co., 249 App. Div. 888; 279 N. Y. 80; 204 S. B. 278; Rowe v. McGovern, 236 App. Div. 866; 254 App. Div. 432; 257 App. Div. 1095; 204 S. B. 280.

[1] t. **Disfigurement.** 1. The board may award proper and equitable compensation for serious facial or head disfigurement, not to exceed three thousand five hundred dollars.

2. The board, if in its opinion the earning capacity of employee has been or may in the future be impaired, may award compensation for any serious disfigurement in the region above the sterno clavicular articulations anterior to and including the region of the sterno cleido mastoid muscles on either side; provided, however, that all such cases shall be heard and determined by the board and not by a referee, but no award under subdivisions one and two shall, in the aggregate, exceed three thousand five hundred dollars.

[1] Side title and first subdivision redrafted by L. 1922, ch. 615, without substantive change from provisions inserted by L. 1916, ch. 622; numeral "1" inserted and second subdivision added by L. 1930, ch. 316.

Award for disfigurement may not be made together with award for permanent total disability under subd. 1 of this section: Clark v. Hayes, 207 App. Div. 560; 238 N. Y. Rep. 553; 123 S. B. 26; nor together with award for impairment of earnings under paragraph "v" of this subdivision: Freeland v. Endicott Forging & Mfg. Co., 233 App. Div. 440; 185 S. B. 74. "Concurrent awards may be made one for serious facial or head disfigurement, and one for disability": Erickson v. Preuss, 223 N. Y. 365; 95 S. B. 73.

The paragraph is constitutional: Sweeting v. American Knife Co., Claim No. 2407-S; 186 App. Div. 926; 226 N. Y. 199; 250 U. S. 596; 95 S. B. 75; 97 S. B. 15; Bianc v. N. Y. Central R. R. Co., 16 S. D. R. 424; 186 App. Div. 925; 226 N. Y. Rep. 586; 250 U. S. 596; 95 S. B. 74; 97 S. B. 15; Vaughn v. Clark Knitting Co., Claim No. 35470; 3 Bui. 114; 186 App. Div. 925; 226 N. Y. Rep. 586; 250 U. S. 596; 95 S. B. 74; 97 S. B. 15.

The Board may increase an award for disfigurement notwithstanding any limitation in § 22: Meadows v. Laundry Trucking Co., 236 App. Div. 767; 11 Ind. Bul. 419; Berger v. Donaldson & Hewes, 209 App. Div. 839; 140 S. B. 144.

Award for facial disfigurement which had been made to an employee in addition to an award for loss of use of his left eye by industrial accident was reversed where such employee, blind in his right eye since childhood, was declared permanently totally disabled and entitled to further compensation from the special fund of § 15, Subd. 8, of the Workmen's Compensation Law: Beekman v. N. Y. Evening Journal, Inc., 258 App. Div. 833; 204 S. B. 283.

History. The insertion of this paragraph relative to disfigurement may be read in the light of Shinnick v. Clover Farms Co., 169 App. Div. 236; 81 S. B. 299, an employer's liability decision later offset by Shanahan v. Monarch Engineering Co., 219 N. Y. 469; 81 S. B. 321; compare § 11.

Prior to amendment of this paragraph by L. 1930, ch. 316, neck disfigurement was not compensable: Fostner v. Morawitz, 31 S. D. R. 549; 211 App. Div. 824; 140 S. B. 142. Award for facial paralysis was reversed in Smolka v. Standard Shipbuilding Corp., 31 S. D. R. 221; 211 App. Div. 827; 133 S. B. 115.

For outlines and references on disfigurement, see 162 S. B. 123, 124, 128, 185 S. B. 71–76.

u. **Total or partial loss or loss of use of more than one member or parts of members.** In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth in paragraphs a to t, both inclusive, of this subdivision, but not amounting to permanent total disability, the board shall award compensation for the loss or loss of use of each such member or part thereof, which awards shall run consecutively.

This new paragraph "u," inserted by L. 1929, ch. 301, offsets the court opinions and decisions in Rubenstein v. Pechter Baking Co., 224 App. Div. 324; 249 N. Y. 433; 161 S. B. 115, 117; Gefers v. N. Y. Window Cleaning Co., 224 App. Div. 792; 249 N. Y. 433; 161 S. B. 116, 117; Bernstein v. Hoffman, 219 App. Div. 152; 149 S. B. 142; and similar cases. It excludes award under paragraph "v" following if injuries are fully provided for under paragraphs "a" to "t" preceding: Sokolowski v. Bank of America, 261 N. Y. 57; 185 S. B. 57. It is not retroactive: Knights v. Morris, 241 App. Div. 642; 265 N. Y. Rep. 527; 185 S. B. 59.

The hand is part of the arm; the finger part of the hand. In the case of an accident occurring prior to enactment of this subd. "u" the Court of Appeals held that award for the arm or leg was appropriate, disregarding the schedules for the hand or the foot, when both arm and hand or both leg and foot were permanently mutilated or otherwise permanently injured; likewise schedule award for the hand or the foot, disregarding the schedules for fingers or toes, when both hand and finger or both foot and toe were permanently crippled by the accident: Flicker v. Mac Sign Co., 252 N. Y. 492; 185 S. B. 60.

v. **Other cases.** In all other cases in this class of disability the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employemnt or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the [1]board on its own motion or upon application of any party in interest. [*Subd.* 3 *am'd by L.* 1915, *ch.* 615; *L.* 1916, *ch.* 622; *L.* 1917, *ch.* 705; *L.* 1920, *chs.* 532–534, 760; *L.* 1922, *ch.* 615; *L.* 1924, *chs.* 317, 320; *L.* 1927, *ch.* 554; *L.* 1928, *ch.* 754; *L.* 1929, *ch.* 301; *L.* 1930, *ch.* 316; *and L.* 1935, *ch.* 661.]

[1] Word "board" substituted for word "commission" by L. 1922, ch. 615.

This paragraph "v"—former paragraph "u" relettered by L. 1929, ch. 301—covers all cases not classifiable under the preceding paragraphs of subd. 3. The context indicates that a case must be classified under such preceding paragraphs, if possible. The two categories are mutually exclusive: Sokolowski v. Bank of America, 261 N. Y. 57; 185 S. B. 57; Nycz v. Buffalo Body Corp., 221 App. Div. 620; 156 S. B. 181; Quinn v. Fanning, 221 App. Div. 687; 156 S. B. 184; Vogel v. Manhattan City Dressed Beef Co., 221 App. Div. 823; 161 S. B. 108.

This paragraph "v" should be compared with subdivision 5 following and with § 39 which use the same compensation method. Subdivision 5, unlike paragraph "v," appears to cover all cases of partial disability.

For application of $8 minimum in cases of impaired earning capacity, see citations under subd. 6, below.

Award for disfigurement may not be made together with award under this paragraph "v": Freeland v. Endicott Forging & Mfg. Co., 233 App. Div. 440; 185 S. B. 74.

Award under this paragraph may be superimposed upon compensation for temporary disability: Coppinger v. Corporation, 215 App. Div. 849; 149 S. B. 168; Michaels v. Mowerson & Son, 217 App. Div. 709; 149 S. B. 167; Von Lehn v. Von Lehn Sons, 31 S. D. R. 538.

Schedule award versus impaired earnings award. If an accident permanently injures both a part of the body falling under the enumerated or schedule paragraphs and a part falling under the "other cases" paragraphs, as for instance an arm and the spine, award for impaired earnings is in order: Schaefer v. Buffalo Steel Car Co., 221 App. Div. 808; 156 S. B. 183; 225 App. Div. 839; 250 N. Y. 507; 161 S. B. 251; Jennix v. Warren City Tank & Boiler Co., 221 App. Div. 827; 161 S. B. 112; Carolan v. Hoe & Co., 225 App. Div. 393; 161 S. B. 110; Brennan v. Mack International Motor Truck Corp., 262 N. Y. Rep. 660; 185 S. B. 56; Edwards v. Maryland Casualty Co., 226 App. Div. 837; 185 S. B. 56. See also Pinski v. Superior Fireproof D. & S. Co., 209 App. Div. 305; 133 S. B. 182.

In a case of partial disability caused by acute knee synovitis, the Industrial Board found that the disability was permanent but, a schedule award being impossible, awarded compensation for a brief period under this paragraph "v" and the courts affirmed the award: Mestler v. American Book Sales Co., 248 App. Div. 646; 272 N. Y. Rep. 544; 204 S. B. 284.

In a case of disability due to two unrelated accidents occurring ten weeks apart and under different carriers, the Appellate Division indicated that the first accident called for a schedule award and the second for an impaired earnings award: Walsh v. Dollard and Rensselaer Water Co., 241 App. Div. 782; 13 Ind. Bul. 86.

The Appellate Division reversed an award under this paragraph on the ground that the proof did not show that the permanent disability resulting from a severed median nerve in the right wrist extended beyond the hand or arm: Gruttaduria v. Imperial Metal Mfg. Co., 250 App. Div. 242; 204 S. B. 288.

Schedule award together with protracted temporary total disability award was made after the death of an injured employee from unrelated causes not-

withstanding his disability had been classified during his lifetime as non-schedule permanent partial: McCarty v. U. S. Trucking Corp., 255 App. Div. 741; 281 N. Y. Rep. 704; 204 S. B. 283.

Award under this paragraph was affirmed where the injury was confined to claimant's leg but resulted in an unhealed lesion which caused pain and affected claimant's earning capacity: Robinson v. Pitkin Moving Van Co., Inc., 258 App. Div. 829; 204 S. B. 284.

Award under this paragraph was upheld where injury extended to axilla, shoulder and scapular region as well as arm: Sammis v. Queens Borough G. & E. Co., 257 App. Div. 58; 204 S. B. 285.

Wage earning capacity—determination. Reduced earning capacity may not be fixed arbitrarily: Giovanniello v. Transit Developing Co., 212 App. Div. 188; 140 S. B. 149; Vogler v. Ontario Knife Co., 223 App. Div. 550; 156 S. B. 178; Sando v. Read-Coddington Engineering Co., 212 App. Div. 843; 215 App. Div. 740; 140 S. B. 150; Payette v. White Construction Co., 214 App. Div. 842; 149 S. B. 160; Bletko v. Hoe & Co., 216 App. Div. 774; 149 S. B. 160, 246.

An earlier decision of the Appellate Division indicates that changes in wages due to business conditions, notably to the depression, ought not to be taken into account in determining compensation under this paragraph "v": Santo v. Symington Machine Co., 237 App. Div. 242; affd., 262 N. Y. Rep. 653; 185 S. B. 81; but a later decision, that they ought: Block v. Froehlich, 240 App. Div. 9; appeal dismissed, 264 N. Y. Rep. 618; 185 S. B. 82–84. Other decisions involving the question are Regine v. Unexcelled Mfg. Co., 241 App. Div. 642; 13 Ind. Bul. 31; Merconte v. Associated Operating Co., 241 App. Div. 640; 13 Ind. Bul. 30; Morro v. Architectural Plastering Co., 241 App. Div. 894; 13 Ind. Bul. 149; and Gavriluk v. Rosenwach, 240 App. Div. 797; 12 Ind. Bul. 241.

An employee may have wage-earning capacity though prevented from earning by attendance at rehabilitation school: Berenowski v. Anchor Window Cleaning Co., 221 App. Div. 155; 156 S. B. 174.

A partially disabled employee may carry on with assistance of a helper or helpers: Staniszewski v. Falls National Bank, 239 App. Div. 871; 185 S. B. 242. For note relative thereto and relative to reimbursement rights of an employer who makes payments to his disabled employee, see below, page 180.

An employee worked twelve hours a day at fifty cents an hour; following disability from accident his employer took him on again at the same rate but for only nine hours; the court affirmed award to him on the one dollar and a half difference: Wrazen v. Natl. Aniline & Chemical Co., 217 App. Div. 713; 149 S. B. 160.

Computation of impaired earning capacity is illustrated in Gleason v. Hall, 12 S. D. R. 547, and Ridout v. Rodgers & Hagerty, 14 S. D. R. 710; 95 S. B. 39; 185 App. Div. 911; 224 N. Y. Rep. 711.

Question whether award for impaired earnings by a first accident should cease upon occurrence of a second accident followed by total disability or loss of a member is involved in Carnella v. Roberts Co., 190 App. Div. 923; 98 S. B. 15, 16.

Union wage figured in relation to impaired earnings in Browne v. Dyker Construction Co., 252 N. Y. Rep. 512; 185 S. B. 88.

Findings and conclusions of the Industrial Board should state facts in impaired earnings cases: Del Moores v. Kenn-Well Contracting Co., 228 App. Div. 727; 185 S. B. 89.

Subdivision 5-a following, as added by L. 1930, ch. 316, prescribes methods of determining "wage-earning capacity." Court decisions in cases occurring prior to enactment of it seemed to indicate that when an injured employee trying to get back into gainful employment had a series of alternating employed periods and idle periods, though his physical condition on account of the accident remained the same throughout, uniform award for the entire time at the wage earning capacity evidenced by the employed periods was appropriate: Mead v. Buffalo G. E. Co., 212 App. Div. 191; 140 S. B. 147; Rudolph v. Wieland, 214 App. Div. 831; 140 S. B. 148, 149; 219 App. Div. 756; 156 S. B. 177; Cooper v. Chateaugay Ore & Iron Co., 225 App. Div. 703; 161 S. B. 128. For affirmation of

impaired earnings award over lengthy period based on a single payment at $5 a week for not more than ten days' work, see Kolodick v. G. E. Co., 252 N. Y. Rep. 522; 9 Ind. Bul. 25; 161 S. B. 63. A claimant went out and established his earning capacity by brief jobs: Palermo v. Silvestro, 222 App. Div. 842; 248 N. Y. Rep. 514; 156 S. B. 172. The Chairman of the Board sought determination of earning capacity by hypothetical questions put to an employment-finding expert in this Palermo case and in Nazarro v. Angelilli, 217 App. Div. 415; 149 S. B. 253; 222 App. Div. 784; 161 S. B. 226.

Cases involving impaired earnings are presented in 81 S. B. 306; 95 S. B. 78, 79; 98 S. B. 15–18; 114 S. B. 47–50; 123 S. B. 28–30; 133 S. B. 182; 140 S. B. 145–153; 149 S. B. 159–166; 156 S. B. 171–186; 161 S. B. 63, 107–118, 127–133, 250–252; 162 S. B. 114, 115, 121–123, 174; 185 S. B. 43, 55–64, 76–92; 204 S. B. 294–298.

4. **Effect of award.** An award made to a claimant under [1] subdivision [2]three shall in case of [3]death [4]arising from causes other than the injury be payable to and for the benefit of the persons following:

a. If there be a surviving wife (or dependent husband) and no child of the deceased under the age of eighteen years, to such wife (or dependent husband).

b. If there be a surviving wife (or dependent husband) and surviving child or children of the deceased under the age of eighteen years, one-half shall be payable to the surviving wife (or dependent husband) and the other half to the surviving child or children.

The [5]board may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of the minor child. In the absence of such a requirement by the [5]board the appointment for such a purpose shall not be necessary.

c. If there be a surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband) then to such child or children.

[6]d. If there be no surviving wife (or dependent husband) and no surviving child or children of the deceased under the age of eighteen years, then to such dependent or dependents as defined in section sixteen of this chapter, as directed by the board.

[7]An award for disability may be made after the death of the injured employee. [*Subd.* 4 *added as part of subd.* 3 *by L.* 1920, *ch.* 534; *numbered subd.* 4; *am'd by L.* 1922, *ch.* 615, *and L.* 1927, *ch.* 556.]

[1] Word "this" stricken out by L. 1922, ch. 615.
[2] Word "three" inserted by L. 1922, ch. 615.
[3] Word "his" stricken out by L. 1922, ch. 615.
[4] Words "arising from causes other than the injury" inserted and superfluous "to" preceding words "be payable" stricken out by L. 1922, ch. 615.
[5] Word "board" substituted for word "commission" by L. 1922, ch. 615.
[6] This paragraph "d" inserted by L. 1927, ch. 556.
[7] Paragraph "An award . . . injured employee" inserted by L. 1922, ch. 615.

This subdivision is apparently intended to dispose of such number of weekly payments under subdivision three as may not yet have fallen due at time of the injured employee's death; for example, the two hundred and forty-one weekly payments remaining when an employee dies after receiving three weekly payments for loss of his hand. If death arises from the injury, only such weekly

installments as are due and unpaid at time of the death are awardable: Keenholts v. Bayer Co., 263 N. Y. 77; 185 S. B. 159, 160; Manning v. Stroh & Wilson, Inc., 247 App. Div. 233; 204 S. B. 290; see notes to § 33, below. Decedent's claim suffices: Hughes v. Trustees of Saint Patrick's Cathedral, 245 N. Y. 201; 156 S. B. 192. An employee having died pending payment of a lump sum to him, the Appellate Division affirmed award of the lump sum to his widow: Lawrence v. Kenn-Well Contracting Co., 31 S. D. R. 585; 211 App. Div. 825; 140 S. B. 189.

A surviving wife having died before periodic payments to her under paragraph "a" of this subdivision were complete, the Appellate Division held that the remaining payments did not survive to her estate: Bartling (Haushalter Estate) v. General Electric Co., 231 App. Div. 369; 185 S. B. 161–163.

Payments to surviving child were continued after he attained age of eighteen: McCarty v. U. S. Trucking Corp., 255 App. Div. 741; 281 N. Y. Rep. 704; 204 S. B. 283.

Award may not be made under paragraph "d" to a person not dependent: Pfluger v. Proper, 234 App. Div. 641; 185 S. B. 146.

This subdivision is not retroactive: Kroninger v. Syracuse Milling Co., Case No. 11912; 198 App. Div. 981; 114 S. B. 57. See also Draper v. Draper & Sons, Case No. 594293; 201 App. Div. 770; 114 S. B. 57.

The law as of date of accident, instead of date of death, governs awards after death: State Treasurer ex rel. Shanaghan v. Vanderbilt, 33 S. D. R. 199; 220 App. Div. 61; 156 S. B. 189, 190.

History. Insertion of this subdivision by L. 1920, ch. 534, and amendment of it later partly offset Wozneak v. Buffalo Gas Co., 175 App. Div. 268; 95 S. B. 79; and Casmey v. Parks' Sons, 189 App. Div. 881; 229 N. Y. Rep. 623; 114 S. B. 57, in which the courts held that the bi-weekly payments for loss of Wozneak's eye and Casmey's hand that had not yet fallen due at the times of their deaths did not survive to their heirs. See also De Santis v. Folcaro, 243 App. Div. 838; 14 Ind. Bul. 84. The amendment by L. 1922, ch. 615, inserting the words "arising from causes other than the injury" indicates that payments not yet due do not survive if death does arise from the injury. In such case death benefits under § 16 will of course be awardable. The amendment by L. 1922, ch. 615, permitting award to be made after the death of the injured employee offsets the opinion and decision in Terry v. General Electric Co., 232 N. Y. 120; 114 S. B. 59.

Prior to the addition of paragraph "d," the Appellate Division reversed award to a mother and dismissed her claim: Conrad v. Glenham Embroidery Co., 213 App. Div. 507; 140 S. B. 159.

4-a. **Protracted temporary total disability in connection with permanent partial disability.** In case of temporary total disability and permanent partial disability both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision three of this section: Arm, thirty-two weeks; leg, forty weeks; hand, thirty-two weeks; foot, thirty-two weeks; [1]ear, twenty-five weeks; eye, twenty weeks; thumb, twenty-four weeks; first finger, eighteen weeks; great toe, twelve weeks; second finger, twelve weeks; third finger, eight weeks; fourth finger, eight weeks; toe other than great toe, eight weeks.

In any case resulting in loss or partial loss of use of arm, leg, hand, foot, [2]ear, eye, thumb, finger or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision three. [*Subd. 4-a inserted by L. 1924, ch. 500; am'd by L. 1941, ch. 712.*]

[1] Words "ear, twenty-five weeks" inserted by L. 1941, ch. 712.

[2] Word "ear" inserted by L. 1941, ch. 712.

Compare notes under subd. 2, above.

If temporary total disability recurs, award may be made for additional protraction: Eppenstein v. Adams & Co., 224 App. Div. 332; 250 N. Y. Rep. 562; 161 S. B. 102.

Total disability protracted beyond the thirty-two weeks in case of amputation of an arm may be based upon injury to another part of the body: Wright v. Village of Little Valley, 238 App. Div. 269; 185 S. B. 49, 50.

If award is for permanent partial disability of two or more members, award for total disability protracted beyond the award period for one of them is permissible: Prince v. Prince Frame Picture Co., 241 App. Div. 898; 13 Ind. Bul. 179.

A sheet metal worker, aged 51 years, whose leg was amputated on May 11, 1939, was discharged on October 27, 1939, with a completely healed stump ready to take an artificial limb. Claimant obtained an artificial limb in December, 1939, but required considerable experience with it before he was able to perform any work. Claimant's physician testified that he was unable to work until May 10, 1940. Carrier contended that the total disability ceased on October 27, 1939, when the stump healed. Decision of the Board overruling said contention and finding that the protracted total disability ran until May 10, 1940, upheld. McCall v. Almirall & Co., Inc., 262 App. Div. 788.

A minor who sustained total loss of vision of the right eye was totally disabled for sixty weeks. The Industrial Board determined his wage expectancy rate pursuant to § 14, subd. 5 of the law and ruled that the compensation rate for the period of temporary total disability and the period of protracted temporary total disability should be fixed at the expectancy rate. Ruling upheld, with statement that, "The protracted temporary total disability falls within the permanent partial disability classification and is subject to the terms of subdivision 5 of § 14." Polsky v. Blackman Plumbing Supply Co., Inc., 262 App. Div. 783.

Award under this subd. 4-a may exceed the maximum number of weeks for loss of a member fixed by subd. 3 and the $5,000 maximum for temporary total disability fixed by subd. 2 of § 15, above: Stolz v. Lasher & Lathrop, 240 App. Div. 314; 266 N. Y. Rep. 426; 185 S. B. 46–49; Wright v. Village of Little Valley, 238 App. Div. 269; 185 S. B. 49, 50.

Proof of protraction was insufficient in Labionti v. Meehan & Sons, 215 App. Div. 607; 149 S. B. 140.

An award under this subdivision, together with a schedule award, was made to a surviving child where an injured employee who had been receiving compensation for an ununited fracture died of unrelated causes: McCarty v. U. S. Trucking Corp., 255 App. Div. 741; 281 N. Y. Rep. 704; 204 S. B. 283.

5. **Temporary partial disability.** In case of temporary partial disability [1]resulting in decrease of earning capacity, the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the accident and his wage earning capacity after the accident in the same or another employment but shall not exceed in total [2]four thousand dollars. [*Former subd.* 4; *am'd by L.* 1916, *ch.* 622; *redrafted and renumbered subd.* 5 *by L.* 1922, *ch.* 615; *am'd by L.* 1927, *ch.* 555, *effective Oct.* 1, 1927.]

[1] Former subd. 4 had words "except the particular cases mentioned in subdivision three of this section" and did not have words "resulting in decrease of earning capacity."

[2] Words "four thousand" substituted for words "three thousand five hundred" by L. 1927, ch. 555.

For additional limitation of amount, compare § 15, subd. 6; for penalty accruing to employee, § 25; for additional compensation for disfigurement, § 15, subd. 3, par. "t".

Compare § 15, subd. 3, par. "v", above, and subds. 5-a and 6, below; for application of $8 minimum in cases of impaired earning capacity, see citations under subd. 6.

A partially disabled employee may carry on with assistance of a helper or helpers. For note relative thereto and relative to reimbursement rights of an employer who makes payments to his disabled employee, see page 180, below.

5-a. **Determination of wage earning capacity.** The wage earning capacity of an injured employee in cases of partial disability shall be determined by his actual earnings, provided, however, that if he has no such actual earnings the industrial board may in the interest of justice fix such wage earning capacity as shall be reasonable, but not in excess of seventy-five per centum of his former full time actual earnings, having due regard to the nature of his injury and his physical impairment. [*Subd. 5-a inserted by L.* 1930, *ch.* 316.]

Compare § 15, subd. 3, par. "v", and subd. 5, above.

This subd. 5-a is constitutional and is retroactive: Iuppa & Battle Co. and Miller Cabinet Co. v. State Industrial Board, 291 U. S. 646; 185 S. B. 76–78; 188 S. B. 167; Santo v. Symington Machine Co., 237 App. Div. 242; 262 N. Y. Rep. 653; 185 S. B. 78, 81; Fomolo v. Oakdale Contracting Co., 235 App. Div. 749.

For determination by "actual earnings" where wages are affected by business depression, see Santo v. Symington Machine Co., 237 App. Div. 242; 262 N. Y. Rep. 653; 185 S. B. 80–82; Wood v. Seneca Iron & Steel Co., 271 N. Y. Rep. 642; 204 S. B. 294; Block v. Froelich, 240 App. Div. 9; 264 N. Y. Rep. 618; 185 S. B. 82–84; Czaus v. Lalance & Grosjean Mfg. Co., 240 App. Div. 799; 185 S. B. 82, 84–86.

In the absence of "actual earnings" the Board may fix such earning capacity as the evidence of physical impairment supports: Montgomery v. Seneca I. & S. Co., 236 App. Div. 19; 185 S. B. 78, 525.

Facts may be produced to show that the "actual earnings" are not the full wages that the employee can reasonably earn: Smith v. Tonawanda Paper Co., 238 App. Div. 690; 185 S. B. 79.

For numerous Appellate Division decisions without opinion interpreting this subd. 5-a, see titles "Impairment of earnings" and "Earning capacity, impairment" in current and annual indexes of Industrial Bulletin, May, 1932, forward.

Actual wages were held not determinative of wage earning capacity where claimant rejected better paying job: Sammis v. Queens Borough G. & E. Co., 257 App. Div. 58; 204 S. B. 285.

Award for reduced earnings based on difference in hourly rates was denied a partially disabled five-and-one-half day worker who returned to work on seven-day basis at increased weekly salary: Agrelli v. Interborough R. T. Co., 255 App. Div. 731; 204 S. B. 294.

Award for reduced earnings based on loss of living expenses was made to a traveling real estate manager who received salary and living expenses and who was rendered unable to travel due to accident, with consequent loss of living expenses: Rowe v. Kinney Co., Inc., 255 App. Div. 904; 204 S. B. 296.

Award for reduced earnings for period following discharge from employment was affirmed where claimant, a lineman whose wage earning capacity was reduced 50 per cent as a result of industrial accident, had been reemployed at light work by the employer at his regular wage and was dicharged at behest of a labor union for failure to pay union dues: Dempsey v. N. Y. Rapid Transit Corp., 259 App. Div. 948; 204 S. B. 295.

Award for reduced earnings for a period subsequent to voluntary retirement was affirmed in the case of a municipal employee who had been declared permanently partially disabled in 1933 and thereafter had returned to light work at his regular wage and continued therein until his retirement in 1938: Pettinato v. City of New York, 259 App. Div. 944; 204 S. B. 297.

An automobile salesman sustained accidental injuries resulting in a non-schedule permanent partial disability. During the year prior to his accident he worked solely on a commission basis and averaged $48.76 weekly. Upon cessation of his temporary total disability he resumed his former occupation, again working on a commission basis. Thereupon the Industrial Board computed claimant's reduced earnings rate on a week to week basis, disregarding such weeks in which his commissions exceeded his former average weekly earnings. The carrier contended that computation of claimant's reduced earnings rate should be based on all his earnings over a substantial period of time. Held that claimant's reduced earnings rate should be established over a substantial period of time, with a continuing rate at the $8 minimum prescribed by § 15, subd. 6, pending periodic adjustments by the Industrial Board. Churchill v. Finger Lakes Garages, Inc., 262 App. Div. 410.

6. **Maximum and minimum compensation for disability.** Compensation for [1] permanent or temporary partial disability, [2] or [3] for permanent or temporary total disability shall not exceed twenty-five dollars per week; nor [4] be less than eight dollars per week; provided, however, that if the employee's wages at the time of injury are less than eight dollars per week, he shall receive his full weekly wages; [5] further provided, that in [6] each case of permanent total disability [7] minimum compensation shall not be less than fifteen dollars per week, [8] except that where the employee's wages at the time of injury are less than fifteen dollars per week, he shall receive his full weekly wages [9] but in no event shall compensation when combined with decreased earnings or earning capacity exceed the amount of wages which the employee was receiving at the time the injury occurred. [*Former subd.* 5; *am'd by L.* 1920, *ch.* 532; *redrafted and renumbered subd.* 6 *by L.* 1922, *ch.* 615, *without substantive change; am'd by L.* 1927, *ch.* 558; *L.* 1930, *ch.* 609; *L.* 1934, *ch.* 290; *L.* 1935, *ch.* 849, *and L.* 1937, *ch.* 86.]

[1] Words "permanent or temporary partial" inserted by L. 1927, ch. 558.

[2] Word "or" substituted by L. 1935, ch. 849, for words "shall not exceed twenty dollars per week nor be less than eight dollars per week; compensation."

[3] Words "for permanent . . . nor less than eight dollars per week" inserted by L. 1927, ch. 558.

[4] Word "be" omitted by L. 1927, ch. 558, and restored by L. 1935, ch. 849.

[5] Words "further . . . per week" inserted by L. 1930, ch. 609.

[6] Word "each" inserted by L. 1934, ch. 290.

[7] Words "caused by loss of both eyes" eliminated by L. 1934, ch. 290.

[8] Words "except . . . weekly wages" added by L. 1934, ch. 290.

[9] Remainder of subdivision added by L. 1937, ch. 86.

Compare notes to § 14.

For history of this subd. 6 prior to amendment of it by L. 1935, ch. 849, see 162 S. B. 126.

The courts have held the $8 minimum to be applicable in Callari v. N. Y. State Rys., 246 App. Div. 332; 272 N. Y. Rep. 656; 204 S. B. 298; Seckler v. Morris Storage Co., 243 App. Div. 840; 14 Ind. Bul. 86; Kunkel v. Bossert & Sons, 243 App. Div. 649; 14 Ind Bul. 28; Ostroff v. Kipnis Bros., Radiator Corp., 243 App. Div. 659; 14 Ind. Bul. 30; and Kadison v. Gottlieb, 226 App. Div. 700; 161 S. B. 157.

Amendment of 1937 that "in no event shall compensation when combined with decreased earnings . . . exceed" wages received at time of accident was held not retroactive: Fusco v. City of New York, 256 App. Div. 862; 280 N. Y. Rep. 826; 204 S. B. 300.

Fifteen dollar minimum prescribed by this subdivision applies to awards payable from the total disability fund of § 15, subd. 8: Martin v. Fibre Conduit Co., 257 App. Div. 605; 204 S. B. 310.

The proviso relative to "full weekly wages" figured under subd. 3 of § 14, above, in Hall v. Salvation Army, 236 App. Div. 199; 261 N. Y. 110; 177 S. B. 47; 12 Ind. Bul. 77; Kadison v. Gottlieb, 226 App. Div. 700; 161 S. B. 157; Dingee v. Dairymen's League, 219 App. Div. 846; 156 S. B. 211, 212; Fox v. Bachnor Bros., 191 App. Div. 706; 98 S. B. 40; Morey v. Worden, 2 S. D. R. 494; 81 S. B. 328; compare amendments of subd. 3 by L. 1928, ch. 754.

6-a. **Reclassification of disabilities.** [1] Subject to the limitations set forth in sections twenty-five-a and one hundred twenty-three of this chapter, the board may, [2] at any time, without regard to the date of accident, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition, or that the previous classification was erroneous and not in the interest of justice; [3] provided, however, that if, after seven years from the date of the accident, a disability has been reclassified as permanent total disability or permanent partial disability, and an application is made for review, such review shall be made by the entire board and no decision or award shall be made except by the affirmative vote of at least three members thereof. If, in the event of a denial of reclassification, the claimant shall make application for review, such review shall be made in the same manner. [*Subd. 6-a inserted by L.* 1927, *ch.* 557; *am'd by L.* 1931, *ch.* 292; *L.* 1933, *ch.* 384; *L.* 1940, *ch.* 686.]

[1] Words "Subject . . . of this chapter" inserted by L. 1940, ch. 686.

[2] Words "at any time, without regard to" substituted for words "within three years from" by L. 1933, ch. 384; words "three years" substituted for words "one year" by L. 1931, ch. 292.

[3] Rest of subdivision added by L. 1933, ch. 384.

Compare §§ 22, 23 and 123, especially notes under § 22.

The Court of Appeals has restricted the application of this subdivision to change from one of the four major classes of disability to another: Schaefer v. Buffalo Steel Car Co., 250 N. Y. 507; 161 S. B. 251.

Schedule award together with protracted temporary total disability award was made after the death of an injured employee who died of unrelated causes notwithstanding his disability had been classified during his lifetime as non-schedule permanent partial: McCarty v. U. S. Trucking Corp., 255 App. Div. 741; 281 N. Y. Rep. 704; 204 S. B. 283.

The 1933 amendment to this subd. 6-a is retroactive: Stolz v. Lasher & Lathrop, 240 App. Div. 314; 266 N. Y. Rep. 426; 185 S. B. 47; Simmond v. U. S. Gypsum Co., 239 App. Div. 868; 12 Ind. Bul. 138; Sweet v. Cantine Co., 239 App. Div. 870; 12 Ind. Bul. 139; Webb v. Building Demolishing Co., 241 App. Div. 900; 266 N. Y. Rep. 562; 14 Ind. Bul. 50. This subdivision, as originally enacted in 1927, was held to be retroactive: Vincent v. Allerton House Co., 256 N. Y. 522; 185 S. B. 521; as was also the 1931 amendment: Montgomery v. Seneca Iron & Steel Co., 236 App. Div. 19; 185 S. B. 125. For other opinion cases interpretative of the eliminated time limit see 185 S. B. 519–534.

7. **Previous disability.** The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining

compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability. [*Former subd.* 6; *am'd by L.* 1915, *ch.* 615; *renumbered subd.* 7 *by L.* 1922, *ch.* 615.]

The word "disability" in the expression "previous disability" in this subdivision "is descriptive of a condition resulting from an injury received and does not apply to subnormal functional defects resulting from a natural cause": Bervilacqua v. Clark, 225 App. Div. 190; aff'd, 250 N. Y. Rep. 589; 161 S. B. 184.

Besides the Bervilacqua case, other cases interpretive of the proviso in this subdivision are: Hirschman v. Edwards & Son, 259 N. Y. Rep. 644; 185 S. B. 93; Truesdell v. Albany Hospital for Incurables, 262 N. Y. Rep. 662; 185 S. B. 94; Sortino v. Merchants Despatch, 268 N. Y. Rep. 508; 185 S. B. 94; Blaes v. Bliss Co., 177 App. Div. 370; 87 S. B. 214; Hobertis v. Columbia Shirt Co., 186 App. Div. 397; 95 S. B. 72; Herrman v. Potter Corp., 196 App. Div. 913; 114 S. B. 51; Ladd v. Foster Bros. Mfg. Co., 205 App. Div. 794; 123 S. B. 24; Klock v. Rogers, 213 App. Div. 39; 140 S. B. 153; Lewis v. Lincoln Engineering Corp., 213 App. Div. 545; 140 S. B. 155; Di Carlo v. Elmwood Construction Co., 5 Ind Bul. 113; 214 App. Div. 857; 149 S. B. 146; Mose v. Tupper Lake Chemical Co., 227 App. Div. 674; 185 S. B. 171; Nolan v. Arrow Storage Warehouse, 226 App. Div. 709; 185 S. B. 96; Fenemore v. N. E. Electric Co., 227 App. Div. 677; 185 S. B. 171; Carlstedt v. Marinelli, 230 App. Div. 796; 185 S. B. 178; Specht v. Newmont Garage, 235 App. Div. 646; 11 Ind. Bul. 162; Cikquemani v. Walter & Hodge, 235 App. Div. 754; 11 Ind. Bul. 234; McAllister v. Cobb, 237 App. Div. 674; 185 S. B. 171; Albin v. Wise, 239 App. Div. 871; 12 Ind. Bul. 167; Schurick v. Bayer Co., 246 App. Div. 651; 272 N. Y. 271; 204 S. B. 307. See also Opinion of Attorney-General, December 13, 1937.

Claimant who had previously injured his eye was awarded compensation for industrial blindness therein following second accident upon finding that preexisting reduced vision in the eye was due to natural causes: Ross v. Holland, 254 App. Div. 600; 204 S. B. 303.

Claimant whose right eye was defective had to have the eye removed as result of an assault in the course of his employment. Award for total loss of use of the eye was affirmed: Edwards v. 76 West 86th Street Corp., 259 App. Div. 942; 204 S. B. 302.

Claimant who had received 40 per cent schedule award of thumb was awarded compensation for 33-1/3 per cent loss of use of hand less amount of prior schedule following second accident to same thumb with wrist impairment: Turkish v. True Health Bakery, 254 App. Div. 791; 204 S. B. 306.

A cutter sustained injury to four fingers of his left hand in 1922 for which he was awarded 90 per cent loss of use of the hand. In 1937, he suffered injury to the left thumb resulting in 50 per cent loss of use thereof. Carrier on risk in 1937 contended that inasmuch as claimant had received an award for 90 per cent loss of use of the hand as a result of the first accident, he could not now be awarded 50 per cent loss of use of the thumb as a result of the second accident because such award would exceed award for 100 per cent loss of use of the hand. Award for 50 per cent permanent loss of use of the thumb was affirmed: Earl v. Davis Box Toe Co., Inc., 261 App. Div. 862.

The concluding proviso, added by L. 1915, ch. 615, offsets Schwab v. Emporium Forestry Co., 167 App. Div. 614; 216 N. Y. Rep. 712; 81 S. B. 274. L. 1916, ch. 622, made special provision for certain cases in this class by adding subd. 8, following.

8. **Permanent total disability after permanent partial disability.** If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation [1] during the continuance of such total disability to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. [2] If an employee who [3] is found to be entitled to additional compensation under this subdivision shall [4] establish an earning capacity by employment he shall be paid during the period of such employment, instead of the additional compensation above provided, two-thirds of the difference between his average weekly wages at the time the total disability was incurred and his wage earning capacity as determined by his actual earnings in such employment, subject to the limitations in subdivision six of this section. [5] Expenses incurred on behalf of the special fund provided herein as may be required for proper presentation of the facts relative to any claim against such fund shall be a charge only when previously authorized by the commissioner. Such additional compensation [6] and such expense shall be paid out of the special fund created for such purpose in the following manner: The [7] employer, or if insured, his insurance carrier, shall pay [8] into such special fund for every case of injury causing death in which they* are no persons entitled to compensation the sum of [9] five hundred dollars. The [10] commissioner of taxation and finance shall be the custodian of this special fund, and the commissioner shall direct the distribution thereof. [*Former subd.* 7; *added by L.* 1916, *ch.* 622; *renumbered and am'd by L.* 1922, *ch.* 615; *am'd by L.* 1927, *ch.* 493; *L.* 1932, *ch.* 203; *L.* 1937, *ch.* 811; *L.* 1941, *ch.* 588.]

[1] Words "during the continuance of such total disability" substituted for words "for the remainder of his life" by L. 1932, ch. 203.

[2] Sentence following originally added by L. 1932, ch. 203, and am'd by L. 1937, ch. 811. Word "if" substituted for words "in case" by L. 1937, ch. 811.

[3] Words "is found to be entitled to" substituted for words "has been awarded" by L. 1937, ch. 811.

[4] Word "subsequently" eliminated by L. 1937, ch. 811.

[5] Following sentence inserted by L. 1941, ch. 588.

[6] Words "and such expense" inserted by L. 1941, ch. 588.

[7] Words "employer, or if insured, his" inserted by L. 1927, ch. 493.

[8] Words "into such special fund" substituted for words "to the state treasurer" by L. 1927, ch. 493.

[9] Word "five" substituted for word "one" by L. 1922, ch. 615.

[10] Words "commissioner of taxation and finance" substituted for words "state treasurer" by L. 1927, ch. 493.

* So in original. Evidently should be "there."

The penalties imposed by the Workmen's Compensation Law are an additional source of income for the special fund established by this subdivision: §§ 25, 52.

Special funds additional to the fund of this subd. 8 are established by subd. 9 following and by § 25-a, below.

This subd. 8 does not have the provision for investment of surplus moneys and sale of securities contained in subd. 9, following.

The provisions of this subdivision apply whether the previous partial disability was the result of an accident or due to natural causes: Opinion of Attorney-General, December 13, 1937. Compare notes under subdivision 7, above.

The Appellate Division held that payments from the special fund of this section are compensation and claims therefor must be filed within time limit of § 28: Martin v. Wurlitzer Co., 249 App. Div. 321; 204 S. B. 309.

Award for facial disfigurement in the case of an employee who, blind in the right eye from natural causes, lost sight of his left eye by industrial accident was reversed on the ground that it could not properly be made in a permanent total disability case: Beekman v. N. Y. Evening Journal, Inc., 258 App. Div. 833; 204 S. B. 283.

Fifteen dollar minimum prescribed by § 15, subd. 6, applies to awards against the special fund of this subdivision: Martin v. Fibre Conduit Co., 257 App. Div. 605; 204 S. B. 310.

Special fund payments. Requisition of the $1,000 under this subd. 8 and subd. 9 following is constitutional: Staten Island R. T. Ry Co. v. Phoenix Indemnity Co., 281 U. S. 98; 9 Ind. Bul. 169; affirming 251 N. Y. 127; 161 S. B. 209; Sheehan Co., v. Shuler, and New York State Rys. v. Shuler, 265 U. S. 371, 379; 133 S. B. 22; Watkinson v. Hotel Pennsylvania, 24 S. D. R. 300; 195 App. Div. 624; 231 N. Y. Rep. 562; 106 S. B. 10; and an undertaker is not "a person entitled to compensation" so as to bar its application: State Industrial Comn. v. Newman, 11 S. D. R. 645; 179 App. Div. 481; 222 N. Y. 363; 87 S. B. 39; 95 S. B. 30; State Industrial Comn. v. Edsall, 179 App. Div. 481; 222 N. Y. Rep. 657; 87 S. B. 38; neither is the injured employee himself, though compensated for disability previously to his death: State Treasurer (Stemffler) v. Rheinfrank Co., 190 App. Div. 163; 98 S. B. 7; Pettey v. St. Regis Paper Co., 20 S. D. R. 450. If after payment of the* thirteen hundred dollars, the Department discovers persons entitled to compensation, the state treasurer should refund the money to the carrier: Letter of Attorney-General to State Treasurer, May 17, 1918.

The carrier must pay $1,300* to the State Treasurer though persons entitled are in existence, if such persons do not claim death benefits: State Treasurer v. West Side Trucking Co., 198 App. Div. 432; 232 N. Y. 202; 114 S. B. 54; or recover damages under § 29 in excess of compensation: Robertson v. Niagara Falls Power Co., State Treasurer ex rel., 241 N. Y. Rep. 521; 140 S. B. 214; Miller v. Rochester G. & E. Co., 206 App. Div. 723; 123 S. B. 30; or fail to get death benefits because their claims have not been filed within a year, etc.: Laird v. Sterling Oil Co., 207 App. Div. 878; 123 S. B. 30; Breitinger v. Seus, 207 App. Div. 880; 123 S. B. 30; Bik v. Empire Gypsum Co., 114 S. B. 56; also though a person entitled claims benefits but dies before award is made: Chrystal v. U. S. Trucking Co., 250 N. Y. Rep. 566; 161 S. B. 133; White v. Donner Steel Co., 259 N. Y. Rep. 574; 185 S. B. 165; Barrett v. Burnett, 262 N. Y. Rep. 670; 185 S. B. 166; Martin v. Watson, Comr. of T. & F. ex rel., 225 App. Div. 839; 185 S. B. 166; or recovers damages and remarries: Paradiso v. Cox, Comr. of T. & F. ex rel., 258 N. Y. Rep. 540; 185 S. B. 446; but death benefits awarded to a widow before her death and not yet paid to her at time of her death vest in her estate and exclude award to the special funds: Miller v. Pierson & Williams, 253 N. Y. Rep. 541; 185 S. B. 164. The State is entitled to $1,300* notwithstanding decedent employee admitted he was disobeying orders: State Treasurer ex rel. Johnson v. Ulysses Apartments, 232 App. Div. 393; 185 S. B. 101, 102; award of it may be made before expiration of the year: State Treasurer ex rel. Mazzella

* Relative to the payments into the special fund of § 25-a now required, see § 25-a as amended by L. 1940, ch. 686.

v. Inter-Cities Construction Co., 215 App. Div. 851; 149 S. B. 171. Section 21 of the Workmen's Compensation Law puts upon appellants the burden of proving that an award to the special funds is improper: Peiffer v. Underwood, Elliott-Fisher Co., 247 App. Div. 658; 271 N. Y. Rep. 639; 15 Ind. Bul. 226; in this connection see Appellate Division's opinion in Gleasner v. Gleasner Compressed Air Supply & Equipment Co., 245 App. Div. 343; aff'd 269 N. Y. Rep. 590; 204 S. B. 314.

The carrier has a cause of action under § 29, below, to recover from a third party $1,000 paid under this subdivision and subd. 9, following; such right has been upheld in Staten Island R. T. Ry. Co. v. Phoenix Indemnity Co., 281 U. S. 98: 9 Ind. Bul. 169; 251 N. Y. 127; 161 S. B. 209; and Travelers Ins. Co. v. Post & McCord, 128 Misc. 626; 156 S. B. 261; in such an action, prior judgment in favor of an administratrix against the third party is res judicata upon issues of negligence, and defense that deceased employee left him surviving a dependent mother is without merit: Liberty Mutual Insurance Co. v. Colon & Co., 235 App. Div. 117; 260 N. Y. 305; 185 S. B. 449; compare Travelers Insurance Co. v. Staten Island R. T. Ry. Co., 134 Misc. 6; 161 S. B. 218. If the accident has occurred outside New York, the carrier must allege that such action exists under the laws of the State where the accident occurred: Travelers Insurance Co. v. Central R. R. Co. of New Jersey, 143 Misc. 589; 177 S. B. 227; for statute of limitations relative to such an action see D'Andrea v. Wielandt and Fisher v. Turton, State Treasurer ex rel., 254 N. Y. Rep. 609, 610; 185 S. B. 449.

Chapter 87, L. of 1937, gave the carrier cause of action under § 29, below, to recover $300* paid into the special fund of § 25-a.

The law as of date of death, instead of date of injury, governs the amount payable into the funds established by this and the following subdivision: State Treasurer ex rel. Shanaghan v. Vanderbilt, 220 App. Div. 61; 156 S. B. 190.

An employer is not liable for payments to the special funds if his carrier becomes insolvent: Opinion of Attorney-General, January 31, 1935.

The amendments to this and the following subdivision, making an uninsured employer liable for $1,000, correct a defect revealed by Du Bois v. Cohen, 214 App. Div. 837; 149 S. B. 171.

An employee of a non-insured subcontractor sustained fatal injuries in the course of his work. Said employee left no dependents within the meaning of the Workmen's Compensation Law. Decision of the Industrial Board directing the general contractor and its insurance carrier to pay* thirteen hundred dollars into the special funds was reversed, with statement that although the statute directs, in certain circumstances, that the contractor shall pay "compensation" to an employee of his subcontractor, payments into the special funds are in no sense payments of "compensation" to an employee. Holblock v. Riger Bldg. Corp., ex rel., 260 App. Div. 358; 285 N. Y. 217. Awards to special funds were reversed where widow and sons settled death action with employer on theory that deceased was not killed in course of his employment, the court holding that in the absence of an industrial accident awards were improper, and that if there was an industrial accident then settlement was in fact compensation and the awards could not be made on the theory that there were "no persons entitled to compensation": Ryan v. Sheffield Farms Co., Inc., ex rel., 256 App. Div. 867; 204 S. B. 313.

Reimbursement from fund. A self-insurer was decreed reimbursement from the special fund where it paid an award for which the fund was liable: McDonnell v. City of New York, 253 App. Div. 559; 204 S. B. 317.

Special fund awards preferred claims. "Special fund" awards under this subdivision were held entitled to preference in carrier's liquidation proceedings: Matter of People (Lloyds Insurance Co.), 254 App. Div. 344; 281 N. Y. 176; 204 S. B. 319.

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* Relative to the payments into the special fund of § 25-a now required, see § 25-a as amended by L. 1940, ch. 686.

9. [1]**Expenses for rehabilitating injured employees.** An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state [2] education department is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his [3] rehabilitation, not more than ten dollars per week of which shall be expended for maintenance.[4] [5] Such expense and such of the administrative expenses of the state [16] education department [17] as are properly assignable to the expenses of rehabilitating employees entitled to compensation as a result of injuries under this chapter, shall be paid out of a special fund created in the following manner: The [6] employer, or if insured, his insurance carrier, shall pay [7] into the vocational rehabilitation fund for every case of injury causing death, in which there are no persons entitled to compensation, the sum of [8] five hundred dollars. The [9] commissioner of taxation and finance shall be the custodian of this special fund [10] and may invest any surplus moneys thereof in securities which constitute legal investments for savings banks under the laws of this state. He may also sell any of the securities in which such fund is invested if necessary for the proper administration or in the best interests of such fund.

[11] Disbursements from the vocational rehabilitation fund for the additional compensation provided for by this section shall be paid by the [9] commissioner of taxation and finance upon vouchers signed by the [18] commissioner of education or the deputy commissioner of education provided that the compensation claim number of an injured employee undergoing vocational rehabilitation has been verified by the industrial commissioner or an assistant designated by him.

Disbursements from the vocational rehabilitation fund for administrative expenses of the state [16]education department[17] shall be paid by the [9]commissioner of taxation and finance upon vouchers signed by the commissioner of education or the deputy commissioner of education.

Prior to the first days of January, April, July and October there shall be submitted to the [12]director of the budget by the commissioner of education for [13]his approval an estimated budget of administrative expenses of the state [16]education department[17] which it is proposed to charge to the vocational rehabilitation fund for the succeeding three months. There may not be expended from the said fund for such administrative expenses, more than the amounts specified in such budget for each item of expenditure, except as authorized by the [14]director of the budget.

[15]There may be expended from such fund annually for a period of [19]six years commencing July first, nineteen hundred thirty-six, and ending June thirtieth, nineteen hundred [20]forty-two,

an amount not to exceed fifty thousand dollars in any one year, for the purpose of making such studies as may in the judgment of the industrial commissioner be advisable, of means and methods of eliminating hazards to life and health from dusts and other occupational diseases, and disseminating information on the subject of control and prevention, provided however, that any information obtained in connection with such studies and investigations shall not be admissible as evidence in any action at law or in the adjudication of any claim arising under the workmen's compensation law. Prior to the first days of January, April, July and October beginning June first, nineteen hundred thirty-six, there shall be submitted to the director of the budget by the industrial commissioner for his approval an estimated budget of expenses for the purposes herein set forth, which it is proposed to charge against the vocational rehabilitation fund during the succeeding three months. There may not be expended from such fund for the purposes herein set forth more than the amounts specified in such budget for each item of expenditure, except as authorized by the director of the budget, and not exceeding in any one year the total sum of fifty thousand dollars. [*Former subd.* 8; *added by L.* 1920, *ch.* 760; *renumbered and am'd by L.* 1922, *ch.* 615; *am'd by L.* 1925, *ch.* 656; *L.* 1926, *ch.* 261; *L.* 1930, *ch.* 183; *L.* 1936, *ch.* 888; *L.* 1939, *ch.* 517; *L.* 1941, *ch.* 274.]

[1] Side title "Expenses for rehabilitating injured employees" substituted for words "Maintenance for employees undergoing vocational rehabilitation" by L. 1925, ch. 656.

[2] Words "education department" substituted for words "department of education" by L. 1939, ch. 517; words "department of education" had been substituted for words "board of vocational education" by L. 1926, ch. 261.

[3] Words "rehabilitation . . . expended for" inserted by L. 1925, ch. 656. Comma after word "rehabilitation" substituted for semicolon by L. 1926, ch. 261.

[4] Words "but such additional compensation shall not exceed ten dollars a week" stricken out by L. 1925, ch. 656.

[5] Words "Such expense . . . this chapter," substituted for words "The expense" by L. 1926, ch. 261.

[6] Words "employer, or if insured, his" inserted by L. 1926, ch. 261.

[7] Words "into the vocational rehabilitation fund" substituted for words "to the state treasurer" by L. 1926, ch. 261.

[8] Word "five" substituted for word "nine" by L. 1922, ch. 615.

[9] Words "commissioner of taxation and finance" substituted for words "state treasurer" by L. 1930, ch. 183.

[10] Words "and the industrial commissioner shall direct the distribution thereof" stricken out by L. 1926, ch. 261; remainder of paragraph added by L. 1930, ch. 183.

[11] The following three paragraphs were originally added by L. 1926, ch. 261. Subsequent amendments are indicated in the notes.

[12] Words "director of the budget" substituted for word "governor" by L. 1936, ch. 888.

[13] Word "his" substituted for word "its" by L. 1936, ch. 888.

[14] Words "director of the budget" substituted for words "board of estimate and control" by L. 1936, ch. 888.

[15] Remainder of subdivision added by L. 1936, ch. 888.

[16] Word "education" inserted by L. 1939, ch. 517.

[17] Words "of education" stricken out by L. 1939, ch. 517.

[18] Words "industrial commissioner or deputy industrial commissioner" stricken out and words "commissioner of education . . . or an assistant designated by him" inserted by L. 1939, ch. 517.

[19] Word "six" substituted for word "five" by L. 1941, ch. 274.

[20] Words "forty-two" substituted for words "forty-one" by L. 1941, ch. 274.

The notes under subd. 8, above, for the most part apply as well to this subd. 9.

For expenses permissible under this subdivision see Opinions of Attorney-General, June 17 and July 30, 1925 in 35 S. D. R. 247, 282; Christmas holiday round trip fare home is a proper charge: Opinion of Attorney-General, January 8, 1935.

For amount of administrative expenses payable from this fund see Opinion of Attorney-General, June 8, 1937.

A partially disabled employee has an earning capacity though prevented from earning by attendance upon rehabilitation school: Berenowski v. Anchor Window Cleaning Co., 36 S. D. R. 356; 221 App. Div. 155; 156 S. B. 174.

Under the "Physically Handicapped Law," Article 47 of the Education Law, added by L. 1920, ch. 760, injured employees, to be eligible to the benefits of the subdivision, must be fourteen years of age or over, must have been domiciled within the State of New York one year or more, and must be citizens of the United States or persons who have declared their intention to become citizens. The law is administered by an Advisory Commission of four members, the State Commissioners of Education and Health, the State Industrial Commissioner and the President of the State Board of Social Welfare. It requires the Department of Labor to report to the Department of Education the names of such injured employees as need rehabilitation and to cooperate with the Department of Education generally in carrying out the article.

The Legislature may divert the surplus of this fund to the general fund of the State or to administration of the Workmen's Compensation Law: Opinion of Attorney-General, December 5, 1932. By Chapter 888 of 1936 it has diverted an amount not in excess of $250,000 to studies of means and methods of eliminating the hazards of dust and other occupational diseases and in dissemination of information relative to control and prevention of them in line with previous Opinion of Attorney-General, March 10, 1936. By § 25-a, below, it has diverted $250,000 thereof to the fund for reopened cases. For subsequent Chapters effecting additional transfers of funds from this special fund, see numbered notes to this subdivision.

Cash and securities of the fund established by this subd. 9 should be turned over by the Department of Labor to the state treasury: Opinion of Attorney-General, August 7, 1933.

Consult series of bulletins, 1921 to date, published by the Federal Board for Vocational Education, Washington, D. C.

§ 16. **Death benefits.** If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. **Reasonable funeral expenses** not exceeding [1] two hundred dollars. [2]If such funeral expenses shall have been paid by the claimants entitled to compensation under this section or by others, the funeral expenses awarded shall be made payable to such claimants or others; otherwise they shall be made payable to the undertaker who shall have provided burial. Funeral expenses shall be awarded in case of all injuries causing death including cases in which there are no persons entitled to other compensation under this chapter. [*Subd.* 1 *am'd by L.* 1923, *ch.* 566; *and L.* 1929, *ch.* 299.]

[1] Word "two" substituted for word "one" by L. 1923, ch. 566.
[2] Remainder of subdivision added by L. 1929, ch. 299.

Funeral expenses are "compensation": § 2, subd. 6; failure to file claim in accordance with § 28 debars award for them: State Treasurer ex rel. Hasson v. Gude Co., 222 App. Div. 708; 161 S. B. 137.

In connection with a $1000 payment to the state treasurer, funeral expenses should be paid first: Opinion of Attorney-General, July 27, 1934; the carrier has independent cause of action against a third party for them: § 29.

Funeral expenses of members of the general public employees' retirement system are awardable under this subd. 1 in accordance with amendments to § 67 of the Civil Service Law which offset Segnit v. Westchester County Park Comn., 233 App. Div. 232; 185 S. B. 99, 110.

The date of death, not the date of accident, determines application of the increase to $200: Donoho v. Atlantic Basin Iron Works, 210 App. Div. 535; 140 S. B. 161.

The 1929 amendments of this subdivision, effective April 5, 1929, are not retroactive: McNiven v. Highland Hospital, 231 App. Div. 782; 185 S. B. 110; compare Schulman v. Schulman, 228 App. Div. 866; 185 S. B. 110.

1-a. **For the purpose of this section,** the term dependent blind or crippled as used herein in relation to dependent children shall be deemed to mean totally blind or physically disabled children whose disablement is total and permanent. [*Subd.* 1-*a inserted and incorrectly styled a new section by L.* 1931, *ch.* 291, *effective July* 1, 1931.]

Date of the parent's death, not date of his disablement, governs award to a dependent blind or crippled child; if the death has occurred before April 5, 1929, the case is not compensable: Messnick v. Kahn Bros., 235 App. Div. 114; 185 S. B. 122.

In a case of accident and death following the going into effect of this subd. 1-a, the courts affirmed award to the committee of an insane adult daughter: Fluhr v. Lunde, 265 N. Y. Rep. 531; 185 S. B. 124.

Before enactment of this subd. 1-a, the Appellate Division affirmed awards to an adult daughter affected by nervous breakdown: Laube v. Van Sicien, 234 App. Div. 809; 185 S. B. 124; and an adult son afflicted by weak-mindedness: Goldberg v. Michaels Optical Co., 236 App. Div. 876; 185 S. B. 124; but after enactment of it, affirmed denial of award to an adult son not totally and permanently crippled: Lynch v. N. Y. Rapid Transit Corp., 245 App. Div. 885; 14 Ind. Bul. 250.

A child of a deceased employee had a 90 per cent permanent loss of vision in each eye. Finding that said child was totally permanently disabled was sustained. Justinger v. Black Rock Milling Corp., 251 App. Div. 770; 204 S. B. 323.

2. **If there be a surviving wife** (or dependent husband) and no child of the deceased under the age of eighteen years [1]and no child of any age dependent blind or crippled, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent *widowhood) with two years' compensation in one sum, upon remarriage; and if there be a surviving child or children of the deceased under the age of eighteen years [2]or a surviving child or children of

* The word "widowerhood" inadvertently changed to read "widowhood" by Ch. 303, L. 1929. Proof of dependency is required where claim for compensation is made by a husband on account of death of his wife upon whom he was dependent: Opinion of Attorney-General, May 6, 1937.

any age dependent blind or crippled, the additional amount of ten per centum of such wages for each such child until of the age of eighteen years [3]or until the removal of the dependency of the blind or crippled child or children; in case of the subsequent death [4]or remarriage of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age [5]or dependent through mental or physical infirmity, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years [6]or until such dependent blind or crippled condition shall have been removed; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages. The [7]board may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of a minor child [8]or a dependent blind or crippled. In the absence of such a requirement by the [7]board the appointment of a guardian for such purposes shall not be necessary. [*Subd.* 2 *am'd by L.* 1914, *ch.* 316; *L.* 1916, *ch.* 622; *L.* 1922, *ch.* 615; *and L.* 1929, *ch.* 303.]

[1] Words "and no child of any age dependent blind or crippled" inserted by L. 1929, ch. 303.

[2] Words "or a surviving child or children of any age dependent blind or crippled" inserted by L. 1929, ch. 303.

[3] Words "or until the removal of the dependency of the blind or crippled child or children" inserted by L. 1929, ch. 303.

[4] Words "or remarriage" inserted by L. 1922, ch. 615.

[5] Words "or dependent through mental or physical infirmity" inserted by L. 1929, ch. 303.

[6] Words "or until such dependent blind or crippled condition shall have been removed" inserted by L. 1929, ch. 303.

[7] Word "board" substituted for word "commission" by L. 1929, ch. 303.

[8] Words "or a dependent blind or crippled" inserted by L. 1929, ch. 303.

For definition of "child" see § 2, subd. 11, above, and notes thereunder; for definition of "blind or crippled child," see subd. 1-a, immediately above. For additional limitation of amount awardable compare subd. 5 of this section; for penalty accruing to beneficiaries, § 25; for lump sum awards other than to remarrying widows, §§ 17 and 25; for death benefit rights in actions against third parties, notes to § 29.

Awards to estates. Death benefits may not be awarded to the estate of a deceased claimant: White v. Donner Steel Co., 259 N. Y. Rep. 574; 185 S. B. 165; Chrystal v. U. S. Trucking Co., 250 N. Y. Rep. 566; 161 S. B. 133; Barrett v. Burnett, 239 App. Div. 863; 262 N. Y. Rep. 670; 185 S. B. 166; death benefits awarded before a claimant's death but unpaid at time of her death vest in her estate: Miller v. Pierson & Williams, 253 N. Y. Rep. 541; 185 S. B. 164.

Where a widow died prior to the making of an award of death benefits it was held that her estate was not entitled to the benefits which had accrued during widowhood: Corcoran and Others v. Albee-Godfrey Whale Creek Co., 255 App. Div. 907; 204 S. B. 331; Towle v. Lord & Burnham, 255 App. Div. 907; 204 S. B. 331.

Common law marriage. Doubt has been cast upon the validity of common law marriage in New York by the amendment of § 11 of the Domestic Relations Law by L. 1933, ch. 606; 180 S. B. 20, 79, 80. According to an informal opinion of the Attorney-General of October 6, 1937, common law marriages in New York State were illegal from about the year 1901 to January 1, 1908; from January 1, 1908 to April 29, 1933, they could be lawfully contracted; from April 29, 1933, the effective date of ch. 606, Laws of 1933, they have been pro-

hibited; such marriages contracted during periods when they were legal are uneffected by subsequent legislation. Prior to the 1933 amendment the Court of Appeals held that common law marriages could be contracted in New York and were valid for death benefit awards: Ziegler v. Cassidy's Sons, 4 S. D. R. 343; 220 N. Y. 98; 95 S. B. 88; awards to common law wives have been affirmed in Brooks v. Williams Construction Co., 261 N. Y. Rep. 679; 185 S. B. 111; Barbour v. Broadway Cleaning Co., 252 N. Y. Rep. 514; 185 S. B. 111; Borton v. McClintic-Marshall Co., 252 N. Y. 513; 185 S. B. 111; Dodd v. 461 Eighth Ave., 16 S. D. R. 427; 227 N. Y. Rep. 597; 98 S. B. 24; Kail v. Lackawanna Steel Construction Co., 262 N. Y. Rep. 669; 185 S. B. 112; Konieczny v. Kresse Co., 234 App. Div. 517; 185 S. B. 112; Batewell v. Ferguson Co., 202 App. Div. 861; 114 S. B. 62; Rodriguez v. Wilson & Co., 216 App. Div. 779; 149 S. B. 178; and Morey v. Castle Baths, 221 App. Div. 825; 161 S. B. 137; but see Hill v. Vrooman, 215 App. Div. 847; 149 S. B. 177. See also Klecan v. Phillips & Co., 241 App. Div. 640; 185 S. B. 115, 116.

Claimant who divorced first husband in Nevada and married decedent there in 1935, living with him thereafter in New York and New Jersey until his death in 1937, was held to be his legal widow notwithstanding she had been divorced by the first husband in New York in 1936 on ground of her conduct with decedent: Freyfogle v. Messenger Printing Co., 257 App. Div. 1094; 204 S. B. 325.

Award to claimant as common law widow was upheld even though she had cohabited with decedent prior to her husband's death in 1929, the relationship thereafter having been continued under an agreement to live as husband and wife: Johnson v. 2101 Amsterdam Realty Corp., 257 App. Div. 1096; 204 S. B. 325. See also Hansen v. Mohjar Corp., 259 App. Div. 769; 204 S. B. 324.

Dependency of husband. The Appellate Division has affirmed awards to husbands for death of their wives in Ren v. Certain-Teed Products Corp., 228 App. Div. 867; 9 Ind. Bul. 172; Barnard v. Otsego Hotel, 189 App. Div. 883; 98 S. B. 25; Rexford v. Berley Studios, 226 App. Div. 839; 177 S. B. 219; Mason v. 980-984 Simpson Street Corp., 239 App. Div. 294; 185 S. B. 147; Bader v. Reisman, 257 App. Div. 1086; 204 S. B. 326; Nagy v. Goldstein, 261 App. Div. 1030.

Proof of marriage. Relative to validity and proof of marriages, contracted in foreign countries, see Masocco v. Schaaf, 234 App. Div. 181; 185 S. B. 117.

The courts affirmed benefits for death of a husband married under an assumed name: Cassidy v. 143 West 49th St. Corp., 256 N. Y. Rep. 576; 10 Ind. Bul. 230.

Hearsay evidence of marriage and parentage figured in Gilkes v. Laurelton Homes, 234 App. Div. 640; 11 Ind. Bul. 29.

Death benefits have been denied because of failure to prove marriage in Reiter v. North Shore Gravel Co., 185 App. Div. 910; 95 S. B. 94; Grillo v. Sherman-Stalter Co., 23 S. D. R. 306; 195 App. Div. 362; 231 N. Y. Rep. 621; 114 S. B. 84, 123; Hill v. Vrooman, 215 App. Div. 847; 242 N. Y. Rep. 549; 149 S. B. 177; Vassilakis v. Fairfax Hotel Co., 193 App. Div. 829; 114 S. B. 81; Wegg v. Allison S. & T. Co., 198 App. Div. 962; 114 S. B. 62; Salvadori v. Interborough R. T. Co., 5 S. D. R. 438; McNeill v. Hogan & Sons, 7 S. D. R. 469; Berger v. Shadboldt Mfg. Co., 8 S. D. R. 460; Angelucci v. Kerbaugh, 9 S. D. R. 387; Dalecky v. Berkowitz, 14 S. D. R. 706; 3 Bul. 102; Draper v. International Ry. Co., 19 S. D. R. 543, 4 Bul. 162; and Dunham v. Marshall Co., 26 S. D. R. 105.

Cases involving bigamy and rival claims to wifehood are: Battalico v. Knickerbocker Fireproofing Co., 250 App. Div. 258; 204 S. B. 472; Babington v. Yellow Taxi Corp., 219 App. Div. 495; 156 S. B. 193; Wujtowicz v. American Radiator Co., 226 App. Div. 836; 8 Ind. Bul. 634; Merrill v. Skenandoah Rayon Corp., 244 App. Div. 857; 14 Ind. Bul. 174; Cameron v. Acheson Graphite Co., 14 S. D. R. 683; 3 Bul. 77; Hoag v. Ulster & Delaware R. R. Co., 3 Bul. 134; and Brocotta v. North Collins Shale Brick Co., 32 S. D. R. 350; other cases involving bigamy are Tremberger v. Pape, below, and Beals v. Eureka Paper Co. 183 App. Div. 914; 95 S. B. 96; the court affirmed award for death of a second husband though the first husband was not known to be dead and had not been divorced: Foxluger v. Hakes, 206 App. Div. 639; 123 S. B. 32; but compare Lindemann v. Reid Ice Cream Corp., 222 App. Div. 700; 156 S. B. 195; and for

death of a first husband, though his wife, believing him to be dead, had married another: Van Wyk v. Realty Traders, 215 App. Div. 254; 149 S. B. 176.

A widow and her son by a former common law marriage were denied death benefits where such marriage had not been dissolved prior to her marriage to deceased: Khvedchinia v. Greenwood Cemetery, 254 App. Div. 717; 204 S. B. 326.

Readjustment of payments to children. From date of remarriage of their mother children numbering five or more will equally share 36⅔ per cent of their deceased father's wages for two years and thereafter will equally share 66⅔ per cent; if the children number four or three, they will equally share 36⅔ per cent for two years, and thereafter will each receive 15 per cent; if they number two or one, each will receive 15 per cent for the two years and for subsequent years until age eighteen: Ziegler v. Pictorial Review Co., 216 App. Div. 614; 149 S. B. 183. See also Carlin v. Lockport Paper Co., 214 App. Div. 354; 140 S. B. 165; and King v. N. Y., Ontario & Western Ry. Co., 213 App. Div. 509; 140 S. B. 163–166, in which two cases the accidents, unlike the Ziegler accident, accurred before insertion of the words "or remarriage." If the mother dies within two years after her remarriage, the children will receive immediate increases according to their numbers, as above: Vaughn v. Buena Vista Oil Co., 200 App. Div. 184; 114 S. B. 63, 87; but not if the mother has already received her entire benefits in one lump sum: Di Donato v. Rosenberg, 263 N. Y. 486; 185 S. B. 125. If a father fails to claim or prove dependency upon his wife, deceased by accident, each child will receive 15 per cent, instead of 10 per cent, subject to the 66⅔ per cent limitation: Urban v. Frank & Co., 2 Bul. 46, 11 S. D. R. 612.

Readjustment of payments is due when the widow of a public employee receiving accident benefits under § 65-a of the Civil Service Law dies leaving a child or children who have been receiving benefits under the Workmen's Compensation Law: Opinion of Attorney-General, October 2, 1934.

Two minor children were each awarded 15 per cent of their father's wages as of the time of his death where the widow died before an award was made to her: Towle v. Lord & Burnham, 255 App. Div. 907; 204 S. B. 326.

Remarriage. A widow's death benefits were resumed as of time of their cessation where her remarriage was held void *ab initio:* Renzo v. Reid Ice Cream Corp., 254 App. Div. 794; 279 N. Y. 83; 204 S. B. 327.

A widow's death benefits were directed resumed as of the date of the final decree of annulment of her marriage (voidable), since she was not entitled to support from two sources during the period of her second marriage: Foster v. American Radiator Co., 249 App. Div. 460; 204 S. B. 329.

A widow's death benefits were resumed as of effective date of annulment of her remarriage (voidable): Moll v. Brayer Bros. Construction Corp., 255 App. Div. 168; 204 S. B. 328.

A wife, having received two years' compensation in lump sum, applied for reconsideration of the award on the ground that her remarriage had proved to be illegal: Tremberger v. Pape, Files of Commission, No. 394, January 19, 1916.

Annulment of a remarriage following payment of two year's compensation in one sum entitles claimant to renewal of compensation payments: Duke v. Interborough R. T. Co., Case No. 46978.

General notes. A wife married to an injured man after his accident is entitled to death benefits when he dies of the injury: Crockett v. International Ry. Co., 170 App. Div. 122; 176 App. Div. 45; 95 S. B. 85; Weiss v. Amberg, 220 App. Div. 795; 156 S. B. 195; Sullivan v. Taylor, 226 App. Div. 837; 8 Ind. Bul. 634; Nickerson v. Risley, 231 App. Div. 774; 185 S. B. 116, 117.

Death benefits of a widow or child are not conditioned upon dependency: Crockett v. International Ry. Co., 170 App. Div. 122; 176 App. Div. 45; 95 S. B. 85; Munck v. N. Y. & Queens E. L. & P. Co., 24 S. D. R. 627; 6 Bul. 69; therefore, desertion, non-support and living apart do not debar award: Post v. Wood Coal Co., Case No. 11943; 192 App. Div. 937; 98 S. B. 24; Nestor v. Durcan, Death Case, Nos. 592165 and 593219; 204 App. Div. 851; 118 S. B. 171. A separation agreement whereby a wife has released all claims does not deprive her of death benefits: Mutimer v. G. E. Co., 207 App. Div. 1; 123 S. B. 33.

Statutes of New York governing desertion, separation and divorce are Articles 68–70 of the Civil Practice Act and §§ 7-a and 8 of the Domestic Relations Law. Uncompleted divorce proceedings do not debar wives from death benefits: Ruppert v. Plattdeutsche Volksfest Verein, 263 N. Y. 338; 185 S. B. 120; nor do decrees of separation: Cooley v. American La France Fire Engine Co., 16 S. D. R. 429; 185 App. Div. 918; 95 S. B. 96. A New York divorce decree forbidding remarriage is invalid as against a common law or other marriage entered into outside of New York: Brooks v. Williams Construction Co., 261 N. Y. Rep. 679; 185 S. B. 111; Fisher v. Fisher, 250 N. Y. 313.

Concerning dependency of claim for death benefits upon prior claim for disability compensation, see Whitmyre v. International Business Machines Corp., 267 N. Y. 28; 185 S. B. 489; Wright v. Brooklyn Union Gas Co., 190 App. Div. 824; 98 S. B. 89; 30 S. D. R. 671; 209 App. Div. 844; 140 S. B. 229, 230; Snow v. U. S. R. R. Administration, 209 App. Div. 308; 133 S B. 194; Aff'd., 239 N. Y. Rep. 528.

A young widow's death benefit award included a period of imprisonment: Chase v. Ulster & Delaware R. R. Co., 33 S. D. R. 587; 215 App. Div. 581; 149 S. B. 179.

The addition of the guardianship provision by L. 1916, ch. 622, may be read in the light of Woodcock v. Walker, 170 App. Div. 4; 81 S. B. 308; a mother having continued to collect benefits of two children after their deaths, the Industrial Board refused to charge such collections against the benefits of a surviving child and the Appellate Division, affirming the decision, recommended payment of such child's benefits directly to it or to "some suitable person"; Jacobs v. Sherman Lumber Co., 235 App. Div. 883; aff'd., 260 N. Y. Rep. 668; 185 S. B. 129, 130.

A chauffeur received fatal injuries in the course of his employment. Said chauffeur had entered into a void marriage with a woman who had been previously married to another and not divorced. Five months after decedent's death a child was born of this union. Prior to his death decedent made preparations for the mother during her pregnancy and for the birth of the child. Finding that such posthumous child was an acknowledged illegitimate dependent child of deceased within the meaning of the law was affirmed. Fludd v. Demps, 261 App. Div. 858.

3. **If there be** [1]**a surviving child** or children of the deceased under the age of eighteen years [2]or a dependent blind or crippled child or children of any age, but no surviving wife (or dependent husband) then for the support of each such child until the age of eighteen years, [3]or until the removal of the dependency of such blind or crippled child or children, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two thirds per centum of such wages. [*Subd.* 3 *am'd by L.* 1922, *ch.* 615; *and L.* 1929, *ch.* 303.]

[1] Word "a" inserted by L. 1922, ch. 615.

[2] Words "or a dependent blind or crippled child or children of any age" inserted by L. 1929, ch. 303.

[3] Words "or until the removal of the dependency of such blind or crippled child or children" inserted by L. 1929, ch. 303.

For definitions of "child" and "blind or crippled child" see § 2, subd. 11, and § 16, subd. 1-a, above.

For additional limitation of amount awardable compare subd. 5 of this section; for penalty accruing to beneficiaries, § 25.

See note on children's share under subd. 2, above.

4. **If there be no surviving wife** (or dependent husband) or child under the age of eighteen years, [1]or dependent blind or crippled child of any age, or if the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years [2]or such dependent blind or crippled children shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until of the age of eighteen years; and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the accident, twenty-five per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children. [*Subd.* 4 *am'd by L.* 1916, *ch.* 622; *and L.* 1929, *ch.* 303.]

[1] Words "or dependent blind or crippled child of any age" inserted by L. 1929, ch. 303.

[2] Words "or such dependent blind or crippled children" inserted by L. 1929, ch. 303.

For definitions of "child" and "blind or crippled child" see § 2, subd. 11, and § 16, subd. 1-a, above.

For additional limitation of amount awardable compare subd. 5 of this section; for penalty accruing to beneficaries, § 25.

Dependency. In the great majority of cases in which appeals alleging non-dependency have been taken, the courts have affirmed award without opinion. Analysis of these affirmed cases shows that awards for death of sons and daughters living in their parents' homes have been sustained:

(1) Where the fatally injured son or daughter has been contributing to the general family keep as much as, or more than, the father or mother: Hluboky v. Kopitz, 195 App. Div. 917; 231 N. Y. Rep. 557; 114 S. B. 73; Kneeter v. General Sheet Metal Works, 200 App. Div. 849; 233 N. Y. Rep. 612; 114 S. B. 73; Polino v. U. S. Radiator Co., 200 App. Div. 849; 114 S. B. 75; Zirpola v. Casselman, Case No. 375426; 204 App. Div. 647; 237 N. Y. 367; 123 S. B. 84;

(2) Where the father's health has been poor, his work irregular and his earnings precarious: Smith v. McArthur Bros. Co., 199 App. Div. 943; 233 N. Y. Rep. 537; 114 S. B. 77; Dilg v. Pyrene Mfg. Co., 194 App. Div. 949; 114 S. B. 75; 239 App. Div. 90; 264 N. Y. Rep. 505; 185 S. B. 140; Whittemore v. Binghamton L., H. & P. Co., 195 App. Div. 917; 114 S. B. 75; Bennett v. Page Bros., 197 App. Div. 745; 114 S. B. 74, 133; Thorpe v. Hook, 197 App. Div. 914; 114 S. B. 75; Greenland v. Mills Oil Co., 197 App. Div. 915; 114 S. B. 75; Hamilton v. Woolworth Co., 202 App. Div. 860; 114 S. B. 75; Kelley v. Hoefler Ice Cream Co., 196 App. Div. 800; 204 App. Div. 853; 114 S. B. 69; McGrath v. Watson, 229 App. Div. 818;

(3) Where the father has been out of work and possibly in debt: Eaton v. Metal Alloys, 199 App. Div. 946; 233 N. Y. Rep. 537; 114 S. B. 73; Gersonowitz v. American Pickle Co., 21 S. D. R. 304; 5 Bul. 26; 193 App. Div. 930; 114 S. B. 75; Thorpe v. Hook, 197 App. Div. 914; 114 S. B. 75;

(4) Where the fatally injured son or daughter has gone to work and has possibly given up school because of failing family resources: Russell v. 231 Lexington Ave. Corp., 266 N. Y. 391; 185 S. B. 251, 252, 365; Gersonowitz v.

American Pickle Co., 21 S. D. R. 304; 5 Bul. 26; 193 App. Div. 930; 114 S. B. 75; Egan v. Taggart Bros Co., 194 App. Div. 943; 114 S. B. 75; Wingert v. Title Guaranty & Trust Co., 198 App. Div. 981; 114 S. B. 75; in the Egan case a daughter had quit school, had worked but two and a half days and had not contributed anything to the family purse when fatal accident overtook her;

(5) Where the family has been large and the contribution of the fatally injured son or daughter has been a necessary addition to the father's income: Appignani v. Staten Island R. T. Ry. Co., 201 App. Div. 762; 114 S. B. 74; Beauchamp v. Columbian Mills, 202 App. Div. 772; 114 S. B. 75; Herne v. Lewis Co., 206 App. Div. 785; 123 S. B. 35; Finizio v. Zuckerman Shoe Mfg. Co., 231 App. Div. 772; 10 Ind. Bul. 64;

(6) Where the head of the household has been a widow and the fatally injured son or daughter has been her main or only support: Saltzman v. N. E. Theatre Co., 193 App. Div. 920; 114 S. B. 75; Ryan v. Bossert Corp., 193 App. Div. 930; 114 S. B. 75; Plaus v. Williams, 230 App. Div. 798. See also Carr v. Donner Steel Co., 202 App. Div. 768; 207 App. Div. 3; 123 S. B. 35; 133 S. B. 120;

(7) Where the fatally injured son or daughter has contributed more to the family fund than he or she has received therefrom in board, etc., and diminished family support has resulted from his or her death: Kaufman v. Matzkin Bros., 203 App. Div. 837; 114 S. B. 75; Fortune v. Thousand Islands Yacht Club, 206 App. Div. 785; 123 S. B. 36;

(8) Where an aged farmer has borrowed money from his fatally injured son to save his farm from mortgage foreclosure: Clabaugh v. Howitt-Wood Radio Co., 261 N. Y. Rep. 555; 185 S. B. 148;

(9) In a unique case where the father was employer and dependent, owning a truck and employing his own son at $24 a week salary and netting only $11 from contracting the truck and the son's service to the City of New York: D'Adamo v. D'Adamo, 275 N. Y. Rep. 575; 204 S. B. 332.

The Appellate Division has handed down opinions reversing dependency awards to mothers in Birmingham v. Westinghouse Electric & Mfg. Co., 180 App. Div. 48; 95 S. B. 105; Wilkes v. Rome Wire Co., 184 App. Div. 626; 95 S. B. 108; Frey v. McLoughlin Bros., 187 App. Div. 824; 95 S. B. 109; Fosket v. Buschman, 193 App. Div. 342; 114 S. B. 65; Jedrlinich v. Shewan & Sons, 193 App. Div. 915; 114 S. B. 64; Hoffman v. Van Benthuysen Co., 195 App. Div. 76; 114 S. B. 67; Herman v. American R. E. Co., 196 App. Div. 219; 114 S. B. 68; Kelley v. Hoefler Ice Cream Co., 196 App. Div. 800; 114 S. B. 69; and Calderera v. Nathan & Co., 200 App. Div. 298; 114 S. B. 70; to a father in Schedzick v. Volney Paper Co., 193 App. Div. 551; 114 S. B. 78; to a father without prejudicing awards to a mother and sister in Klein v. Brooklyn Heights R. R. Co., 188 App. Div. 509; 95 S. B. 111; to a father, without prejudicing an award to a mother in Frear v. Ells, 200 App. Div. 239; 114 S. B. 72; and to a brother and grandfather, without prejudicing awards to a mother and grandmother in Mulraney v. Brooklyn R. T. Co., 190 App. Div. 774; 98 S. B. 27, 30. The Court of Appeals reversed an order affirming award to a mother in Novick v. Gimbel Bros., 232 N. Y. Rep. 508; 114 S. B. 72. The Commission has denied award to the mother but made award to the father in Brown v. Uvalde Asphalt Paving Co., Death Case No. 202716; 191 App. Div. 930; 98 S. B. 28; and Kerrigan v. Interborough R. T. Co., 2 Bul. 149; 95 S. B. 124.

Amendment of this subdivision by L. 1916, ch. 622, confirmed the decision in Friscia v. Drake Bros. Co., 167 App. Div. 496; 81 S. B. 309, which decision also held that parents may be dependent upon the wages of minor children.

The Commission made award to a father earning larger wages than his son, the victim of the accident, in Kennedy v. Central City Roofing Co., 15 S. D. R. 618; 3 Bul. 145; 95 S. B. 118; and to a mother earning a salary of thirty dollars a week in Remington v. Briggs Bros. & Co., 179 App. Div. 966; 95 S. B. 126.

Dependents supported by the decedent employee voluntarily, partially or indirectly, are entitled to death benefits: Rockhill v. Warren Bros. Co., 254 N. Y. Rep. 537; 185 S. B. 148; O'Brien v. Flinn-O'Rourke Co., 222 N. Y. Rep. 644; 95 S. B. 104; Walz v. Holbrook, Cabot and Rollins Corp., 170 App. Div. 6; 95 S. B. 104; Chabot v. Terry Bros. Co., Death File No. 21735; 184 App. Div. 917; 95

S. B. 117; LeFevre v. Flinn-O'Rourke Co., File No. 11063; 181 App. Div. 908; 95 S. B. 104; Chase v. Fairbanks, Morse & Co., 4 S. D. R. 369; 181 App. Div. 908; 95 S. B. 119.

A grandchild, brother or sister dependent at time of the accident remains so until age eighteen despite improvement in his or her circumstances and despite marriage; the memorandum of the Appellate Division so held in Brown v. Tannin, 245 App. Div. 900; 204 S. B. 336, citing as authority Lewandowski v. Onondaga Golf & Country Club, 266 N. Y. Rep. 628; 185 S. B. 148, 149; and Lynch v. N. Y. Rapid Transit Corp., 245 App. Div. 885; 14 Ind. Bul. 250.

The Commission found dependency of minor brothers and sisters upon expressed stipulation of the insurance carrier in North v. McCreery Realty Corp., 6 S. D. R. 329.

Dependency may cease for a time, because of employment, and resume upon renewal of original conditions: Dilg v. Pyrene Mfg. Co., 239 App. Div. 90; aff'd, 264 N. Y. Rep. 505; 185 S. B. 140.

Death benefits awarded to a father were suspended when he obtained gainful employment, but benefits to the mother were continued on ground that the father's earnings were inadequate to support the home: Handelman v. Knickerbocker Ice Co., 258 App. Div. 829; 204 S. B. 337.

The notes under section seventeen, following, cite opinions concerning dependency of relatives living in foreign countries.

References to dependency cases are in 162 S. B. 138–141, 253; 185 S. B. 567; and 204 S. B. 332–338.

Precedence among dependents. Death benefits of relatives named in this subdivision are affected (1) by the number of the children and (2) by the remarriage of the widow. In Ziegler v. Pictorial Review Co., 216 App. Div. 614; 149 S. B. 183, cited above under subd. 2, the Board awarded 30 per cent to a widow, 10 per cent to each of her two children and 16⅔ per cent to her mother-in-law; upon her remarriage, each child's share increased to 15 per cent and the mother-in-law's share consequently fell to 6⅔ per cent; two years after the remarriage, the mother-in-law's share would increase to 25 per cent; but grandchildren, brothers and sisters do not take precedence of parents and grandparents: Babb v. Conboy & Brown Construction Co., 264 N. Y. 357; 185 S. B. 129. In third party cases under § 29, persons not entitled to share in the proceeds of an action may have benefits under this subdivision but not in excess of the percentages to which they would be entitled should the persons who have elected to sue have elected to take compensation instead: Plouff v. Port Henry L., H. & P. Co., 250 N. Y. Rep. 616; 161 S. B. 221–223; Zirpola v. Casselman, 237 N. Y. 367; 123 S. B. 86; Adleman v. Armstrong Publishing Co., 222 App. Div. 705; 161 S. B. 221, 222; Cahill v. Terry & Tench Co., 173 App. Div. 418; 81 S. B. 122.

General notes. A step-parent is not entitled to death benefits for fatal injury to a step-child: Kelly v. Borden's Condensed Milk Co., File No. 25418, July 25, 1917.

An adopted child is not entitled to death benefits for fatal injury to the parent of its foster parent: Winkler v. Ullinger, Death Case No. 18469; 181 App. Div. 239; 95 S. B. 102; or to its natural parent: McNally v. Robertson Case No. 593288, Oct. 21, 1921; but a child dependent on its grandparent is entitled to death benefits for fatal injury to such grandparent though its parents are living and able to support it: Yeople v. Rose Co., 3 Bul. 5; 182 App. Div. 438; 223 N. Y. Rep. 687; 95 S. B. 120; awards have been granted to grandchildren in Kingsley v. Bender, 252 N. Y. Rep. 516; 185 S. B. 502; Danson v. N. Y. Rys. Corp., 227 App. Div. 678; 8 Ind. Bul. 739; Bend v. Austin Mfg. Co., 16 S. D. R. 441; 3 Bul. 177; 186 App. Div. 926; 95 S. B. 122; Simonson v Montauk Metallic Bed Co., 186 App. Div. 932; 95 S. B. 122; Myshekia v. Hall, 187 App. Div. 961; 95 S. B. 122; O'Connor v. Getty, 208 App. Div. 753; 123 S. B. 36; Preston v. N. Y. Harbor Dry Dock Co., 215 App. Div. 855; 149 S. B. 187; Lanni v. Amsterdam Bldg. Co., 217 App. Div. 278; 149 S. B. 187; 221 App. Div. 824; 7 Ind. Bul. 33; Millon v. Ideal Wet Wash Laundry Co., 222 App. Div. 710; 7 Ind. Bul. 68; but denied in Newman v. American Fruit Growers, 5 Ind. Bul. 194; 242 N. Y. Rep. 579; 149 S. B. 187; Cardillo v. N. Y. Rys. Co., 230 App. Div. 634; 236 App. Div. 770; 185 S. B. 145; Rawlins v. Ottman & Walter, 236

App. Div. 766; 11 Ind. Bul. 389; Coles v. Connelly Holding Corp., 237 App. Div. 860; 12 Ind. Bul. 27; and Sheridan v. Fuller Co., 3 Bul. 8; 95 S. B. 123.

Awards to half-brothers and half-sisters are valid: Banks v. Adams Express Co., 7 S. D. R. 471; 176 App. Div. 916; 221 N. Y. Rep. 606; 87 S. B. 231; Bylow v. St. Regis Paper Co., 12 S. D. R. 526; 179 App. Div. 555; 87 S. B. 197; and Zalewski v. Gair Co., Death Case No. 17659; 181 App. Div. 964; 95 S. B. 101; also awards to step-brothers and sisters: Kavanaugh v. White Tar Co., 5 Ind. Bul. 167; 216 App. Div. 778; 149 S. B. 184, 196.

Future installments of death benefits, except those of wives and children, are not commutable since there are no tables showing duration of dependency: Wagner v. Wilson & Co., 251 N. Y. 67; 161 S. B. 165; Bailey v. Columbia Rope Co., 184 App. Div. 718; 95 S. B. 169; 217 App. Div. 805; 156 S. B. 201; Russell v. 231 Lexington Ave. Corp., 236 App. Div. 177; 185 S. B. 243; but compare Stack v. Koppers Construction Co., 237 App. Div. 860; 185 S. B. 463 and Pacenza v. Booth & Flinn, 250 App. Div. 225; 204 S. B. 346, in which cases employers applied for the commutations and consented to awards on basis that dependency was coextensive with life.

Section seventeen, following, excludes dependent grandparents, grandchildren, brothers and sisters of aliens, who are in foreign countries, from death benefits, and conditions dependency of parents of aliens, who are in foreign countries, upon at least a year's support.

A ruling of the State Industrial Commission that a claimant is dependent, if supported by any evidence, is final and non-reviewable by the courts: Hendricks v. Seeman Bros., 170 App. Div. 133; 81 S. B. 190.

For provisions governing the payment of awards to non-residents of the United States, Canada or Newfoundland, see new § 25-b as enacted by L. 1941, ch. 492.

5. **Any excess of wages** over one hundred and [1] fifty dollars a month shall not be taken into account in computing compensation under this section [2] and in computing compensation to widows and children of a deceased employee, in no event shall wages be deemed to be less than seventy-five dollars a month. All questions of dependency shall be determined as of the time of the accident. [*Subd. 5, formerly part of subd. 4, am'd by L. 1916, ch. 622; numbered by L. 1922, ch. 615; am'd by L. 1924, ch. 319; L. 1941, ch. 306.*]

[1] Word "fifty" substituted for word "twenty-five" by L. 1924, ch. 319.

[2] Words "and in computing . . . dollars a month" inserted by L. 1941, ch. 306, effective July 1, 1941.

The maximum at date of the employee's death governs: Muller v. Apel, 5 Ind. Bul. 137; 215 App. Div. 737; 242 N. Y. Rep. 499; 149 S. B. 203; Kolb v. Griot & Fischer, 5 Ind. Bul. 22; 214 App. Div. 840; 149 S. B. 203; Burgiere v. Oake, 33 S. D. R. 460.

In computing wages as the basis of benefits to the dependents of a deceased minor, allowance may be made under § 14, subd. 5, for the minor's expectation of wage increase: Kilberg v. Vitch, 4 S. D. R. 434; 171 App. Div. 89; 81 S. B. 330.

The final sentence of subdivision 5 does not govern death benefits to widows and children, since dependency is a legal inference in their case: Wagner v. Wilson & Co., 251 N. Y. 67; 161 S. B. 165; Crockett v. International Ry. Co., 170 App. Div. 122; 176 App. Div. 45; 81 S. B. 398; this includes adopted children: Munck v. N. Y. & Queens E. L. & P. Co., 24 S. D. R. 627; 6 Bul. 69. Dependency as of the time of the accident is commented upon in Yeople v. Rose Co., 182 App. Div. 438; 223 N. Y. Rep. 687; 95 S. B. 120; and Messnick v. Kahn Bros., 235 App. Div. 114; 185 S. B. 122. Death benefits depend not only upon dependency as of the time of the accident but upon its continuance after the accident: Kerrigan v. Interborough R. T. Co., 2 Bul. 149; 95 S. B. 124; Salotar v. Neuglass & Co., Death Case, No. 42922; 188 App. Div. 942; 228 N. Y. Rep. 508; 98 S. B. 100; but compare Hauser v. Eidlitz & Son, 29 S. D. R. 676. A mother may lose dependency by remarriage without loss of dependency by her children: Napolitano v. Baratz, Death File, No. 351; 176 App. Div. 924; 95 S. B. 123.

6. **If there be a person** entitled to death benefits under the provisions of this section, who shall be under the age of eighteen years, and who shall be an inmate of any institution and a public charge upon the department of public welfare of the city of New York, or any other department or body, the benefits allowed hereunder shall be payable to the said department of public welfare of the city of New York or any other department or body to the extent of the reasonable charges for the care and maintenance, during the continuance as a public charge in said institution, of said beneficiary and until the said person shall have attained the age of eighteen years. Any sum or sums remaining after the said payment out of the benefits shall be distributed as provided by the other subdivisions of this section. [*Subd.* 6 *added by L.* 1923, *ch.* 571.]

For case giving origin to this subd. 6, and holding it retroactive, see Green and Hebrew Orphan Asylum v. Forest Box & Lumber Co., D. C., No. 644; 220 App. Div. 788; 6 Ind. Bul. 236.

§ 17. **Aliens.** Compensation under this chapter to aliens not residents or about to become nonresidents of the United States or Canada, shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or, if there is no surviving wife or child or children, to surviving father or mother [1]whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the accident, and except that the [2]board, may at its option, or upon the application of the insurance carrier, shall, commute [3]as of the date of death all [4]compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such [4]compensation as determined by the [2]board. [5]In the case of a resident alien about to become nonresident the future payments of compensation shall be commuted as of the date of nonresidence. [*As am'd by L.* 1916, *ch.* 622; *L.* 1922, *ch.* 615; *and L.* 1937, *ch.* 110.]

[1] Words "or grandfather or grandmother" stricken out by L. 1922, ch. 615.
[2] Word "board" substituted for word "commission" by L. 1937, ch. 110.
[3] Words "as of the date of death" inserted by L. 1937, ch. 110.
[4] Words "future installments of" eliminated by L. 1937, ch. 110.
[5] Concluding sentence added by L. 1937, ch. 110.

For provisions governing the payment of awards to non-residents of the United States, Canada or Newfoundland, see new § 25-b as enacted by L. 1941, ch. 492.

Compare § 121-a, below, proof of dependency and support for one year in foreign countries.

References to alien claimants are in 162 S. B. 128, 131–136, 140, 141, 148, 182; 185 S. B. 563; and 204 S. B. 338–347.

Aliens in foreign countries. Alien dependent residents of Canada receive the same benefits as dependent residents of the United States: Babb v. Conboy & Brown Construction Co., 264 N. Y. 257; 185 S. B. 132, 428; Mallory v. American Bridge Co., 261 N. Y. Rep. 701; 185 S. B. 132. Newfoundland, not being part of Canada, commuted awards to alien residents of it are subject to the one-half provision: Butt v. Hinkle Iron Co., 32 S. D. R. 389.

The word "or" in the expression, "father or mother, or grandfather or grandmother," as it stood prior to amendment by L. 1922, ch. 615, was held to limit

death benefits to but one of the four: Skarpeletzos v. Counes & Raptis Corp., 228 N. Y. 46; 98 S. B. 33. Following this interpretation under the law as it stands now, award may be made to either father or mother but not to both, even though one of the two lives in the United States: Bunis v. Gabbe & Bro., 229 App. Div. 817; 185 S. B. 132; a father to whom award had been made having died before payment of it, the Department made award to the mother: Perino v. Lackawanna Steel Co., 31 S. D. R. 575; 211 App. Div. 218; 241 N. Y. 312; 140 S. B. 167–170. The language of the section indicates that benefits to an alien widow or child exclude benefits to an alien parent: Andolina v. Union Stevedoring Corp., 221 App. Div. 830; 161 S. B. 139, 140; Esoni v. Tisdale Lumber Co., 212 App. Div. 754; 140 S. B. 171.

Alien residents who go abroad merely for visits subject themselves to the one-half provision: Patruno v. Bliss Co., 5 Ind. Bul. 112; 215 App. Div. 850; 149 S. B. 186, 205; Dauphine v. Blair Co., 6 Ind. Bul. 171; 220 App. Div. 63; 156 S. B. 216, 217; but compare Wastie v. McIlvaine, 247 App. Div. 842; 272 N. Y. Rep. 541; 204 S. B. 338.

Prior to the amendment of § 17 by ch. 110, Laws of 1937, making commutation to lump sum one-half from date of death, the courts held that it had to be made from date of award rather than from date of death: Perino v. Lackawanna Steel Co., 241 N. Y. 312; 140 S. B. 168; or rather from date of the carrier's application: Dauphine v. Blair, 220 App. Div. 63; 156 S. B. 216. For an instance of lump award to a foreign family, see Hubinak v. Endicott, Johnson & Co., 8 S. D. R. 507; affd., 175 App. Div. 958; 87 S. B. 163; for date of award and for special method of payment to claimants in Soviet Russia, Werenjchik v. Ulen Contracting Co., 255 N. Y. 56, 411; 10 Ind. Bul. 165; 185 S. B. 133–135. Compare note on lump sum awards under § 25, below.

Future installments of fathers and mothers are not commutable since there are no tables showing duration of dependency: Wagner v. Wilson & Co., 251 N. Y. 67; 161 S. B. 165; Bailey v. Columbia Rope Co., 184 App. Div. 718; 95 S. B. 169; 217 App. Div. 805; 156 S. B. 201; Russell v. 231 Lexington Ave. Corp., 236 App. Div. 177; 185 S. B. 243; but compare Stack v. Koppers Construction Co., 237 App. Div. 860; 185 S. B. 133 and Pacenza v. Booth & Flinn, 250 App. Div. 225; 204 S. B. 346, in which cases employers applied for the commutations and consented to awards on basis that dependency was coextensive with life.

An alien dependent in a foreign country may avoid commutation and reduction of payment to one-half by coming to the United States: Spaduccino v. Hayes & Co., 180 App. Div. 37; 223 N. Y. Rep. 681; 95 S. B. 190; but impending coming does not avoid: Fedorchuk v. Houbigant, 230 App. Div. 528; 185 S. B. 136.

An American woman who migrated to another country and married an alien eligible to naturalization as an American who held not to have lost her American citizenship: Gorman v. 42d St., Manhattanville & St. Nicholas Ave. R. R. Co., 208 App. Div. 214; 133 S. B. 185.

A widow who had never been in this country but had acquired American citizenship by marriage to deceased employee, a naturalized citizen, was held to be an alien pursuant to Title 8 of the U. S. Code, which provides that, "When any naturalized citizen shall have resided for two years in the foreign state from which he came * * * it shall be presumed that he has ceased to be an American citizen." The children, under age eighteen, were held to be American citizens. Johansen v. Staten Island Shipbuilding Co., 272 N. Y. 140; 204 S. B. 338. But see an earlier case, Hansen v. Corson Construction Co., 233 App. Div. 326; 185 S. B. 130.

Accidents to citizens of enemy nations resident and employed within the United States during the World War were and are compensable but benefits awarded to non-resident alien enemies were and are payable to the Alien Property Custodian: Opinion of Attorney-General, Apr. 3, 1918; Koblak v. Wickwire Steel Co., 30 S. D. R. 436; 210 App. Div. 802; 140 S. B. 167.

Consular officers may give notices of injury and file death claims for their nationals: Hunko v. Buffalo Crushed Stone Company, 203 App. Div. 284; 123 S. B. 32; Pinco v. St. Lawrence Pyrites Co., 19 S. D. R. 514; 4 Bul. 149; Sagardi v. Fort Montgomery Iron Works, 21 S. D. R. 433; 5 Bul. 105, but may not, without specific authority, collect monies for them: Scannella v. Hydro Construction Co., 5 Bul. 94.

See also Opinion of Attorney-General, September 8, 1936.

An attorney filed successful claim for non-resident aliens in Lazich v. Wickwire Spencer Steel Co., 238 App. Div. 880; 12 Ind. Bul. 82.

§ 18. **Notice of injury [1] or death.** Notice of an injury [1] or death for which compensation is payable under this chapter shall be given to the commissioner and to the employer within thirty days after the accident causing such injury, and also in case of the death of the employee resulting from such injury, within thirty days after such death. Such notice may be given by any person claiming to be entitled to compensation, or by some one in his behalf. The notice shall be in writing, and contain the name and address of the employee, and state in ordinary language the time, place, nature and cause of the injury, and be signed by him or by a person on his behalf or, in case of death, by any one or more of his dependents, or by a person, on their behalf. It shall be given to the [2]commissioner by sending it by mail, by registered letter, addressed to the [2]commissioner at [3]his office. It shall be given to the employer by delivering it to him or sending it by mail, by registered letter, addressed to the employer at his or its last known place of business; provided that, if the employer be a partnership then such notice may be so given to any one of the partners, and if the employer be a corporation, then such notice may be given to any agent or officer thereof upon whom legal process may be served, or any agent in charge of the business in the place where the injury occurred. The failure to give notice of injury or notice of death unless excused by the board either on the ground that notice for some sufficient reason could not have been given, or on the ground that the employer, or his or its agents in charge of the business in the place where the accident occurred or having immediate supervision of the employee to whom the accident happened, had knowledge of the accident [1]or death, or on the ground that the employer has not been prejudiced thereby, shall be a bar to any claim under this chapter, but the employer and the insurance carrier shall be deemed to have waived such notice unless the objection to the failure to give such notice or the insufficiency thereof, is raised before the [4]board on the [5]first hearing of the claim filed by such injured employee, or his or her dependents [6]at which all parties in interest are present, or represented, and at which the claimant, or principal beneficiary, testifies. [*As am'd by L.* 1918, *ch.* 634; *L.* 1922, *ch.* 615; *L.* 1926, *ch.* 262; *L.* 1939, *ch.* 525.]

[1] Words "or death" inserted by L. 1926, ch. 262.
[2] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.
[3] Word "his" substituted for word "its" by L. 1922, ch. 615.
[4] Word "board" substituted for word "commission" by L. 1922, ch. 615.
[5] Word "first" inserted by L. 1939, ch. 525.
[6] Words "at which . . . testifies" added by L. 1939, ch. 525.

Compare §§ 21, 45, 115. For references on the subject of notices, see 162 S. B. 182–187; 185 S. B. 183, 489–495; and 204 S. B. 348–359.

The day from which the thirty days time limit is reckoned should be excluded from the reckoning: General Construction Law, § 20.

Consular officers may file notices on behalf of their nationals: Hunko v. Buffalo Crushed Stone Co., 203 App. Div. 284; 123 S. B. 111; and committees on behalf of their wards: O'Rourke v. Standard Wood Turning Co., 204 App. Div. 658; 123 S. B. 53.

The amendments of L. 1918, ch. 634, are retroactive: Struzycki v. Smith Contracting Co., 4 Bul. 177; 195 App. Div. 945; 231 N. Y. Rep. 624; 114 S. B. 148.

NOTICE OF INJURY OR DEATH.

Construction. A mere verbal statement that the employee has pricked a finger does not suffice: Bloomfield v. November, 223 N. Y. 265; 95 S. B. 306. The presumption of § 21, subd. 2, that sufficient notice has been given, applies to written, not to verbal report; oral notice is not notice under this section but is a means of making operative one of the three grounds for excusing failure to give written notices, namely, the employer's knowledge; the burden of proving that one of the three excuses exists is upon the claimant; the employee's notice should convey the idea that he is making a claim against his employer: Dorb v. Stearns & Co., 180 App. Div. 139; 95 S. B. 329; Colon v. American Linoleum Mfg. Co., 184 App. Div. 734; 95 S. B. 339; Avellino v. McKee Refrigrator Co., 202 App. Div. 58; 114 S. B. 155. Adequacy of notice is further interpreted in Bixby v. Cotswold Comfortable Co., 195 App. Div. 659; 106 S. B. 35; and Conley v. Upson Co., 197 App. Div. 815; 114 S. B. 154.

The bookkeeper of a corporation is not a proper person to whom to give the written notice: Cuccia v. Roberts Contracting Co., 204 App. Div. 653; 123 S. B. 109; except when he is specially authorized and charged with the handling of accident cases: Winters v. Marcotte & Co., 10 S. D. R. 639; 178 App. Div. 943; 95 S. B. 328; the notice should be given to the corporation's president, secretary, clerk, cashier, treasurer, a director or a managing agent; if the injured person is a city employee, it should be given to the mayor, comptroller, treasurer, counsel, attorney or clerk, except New York City, in which case it should be given to the mayor, comptroller, or counsel: Civil Practice Act, § 228; if a state employee, to the Attorney-General; if a village employee, to the village president or treasurer; if a county employee, to the chairman of the board of supervisors; if a town employee to the town supervisor or clerk; if a school district employee, to a school trustee.

Knowledge of accident or death—what constitutes. The employer has knowledge of the accident if someone has promptly described it to him or to his superintendent: Finch v. Buffalo Envelope Co., 218 App. Div. 31; 149 S. B. 257; Hughes v. Trustees of St. Patrick's Cathedral, 245 N. Y. 201; 156 S. B. 288.

Notice of accident in connection with death claim. Notice of accident is prerequisite to award of death benefits: Whitmyre v. International Business Machines Corp., 267 N. Y. 28, 185 S. B. 489, overruling Hughes v. Saint Patrick's Cathedral, 245 N. Y. 201, 156 S. B. 289, and other prior decisions. The Industrial Board subsequently excused failure to give notice in the Whitmyre case and renewed the award which was affirmed on appeal: Whitmyre v. International Business Machines Corp., 249 App. Div. 678; 274 N. Y. 61; 204 S. B. 351.

Purpose of notice. These notice requirements "ought not to be treated as a mere formality or be dispensed with as a matter of course": Bloomfield v. November, 219 N. Y. 374; 95 S. B. 306. Their object is "to give an employer the opportunity to investigate," not to start a proceeding: Prokopiak v. Buffalo Gas Co., 176 App. Div. 128; 95 S. B. 320. They enable the employer "to test the good faith of the claimant": Hynes v. Pullman Co., 223 N. Y. 342; 95 S. B. 315; Combes v. Geibel, 226 N. Y. 291; 95 S. B. 316; Smith v. Surf Apartments, 253 N. Y. Rep. 542; 185 S. B. 493.

Waiver of notice. The amendment of L. 1918, ch. 634, providing for waiver of notice is in line with the Attorney-General's argument in Henderson v. Donovan Co., case No. 16407; 178 App. Div. 946; 95 S. B. 328; and Blattner v. Pa Pro Co., 14 S. D. R. 669; 3 Bul. 52; 185 App. Div. 900; 95 S. B. 373. The Appellate Division has affirmed a commission ruling that agreement for compensation entered into between employer and employee estops the employer from

pleading want of notice: Farrell v. Swett Iron Works, Case No. 8433; Death Case No. 9257; 184 App. Div. 919; 95 S. B. 304; compare also Lettiere v. D. C. Co., 15 S. D. R. 604. In Twonko v. Rome Brass & Copper Co., Claim No. 35302; 183 App. Div. 292; 224 N. Y. 263; 95 S. B. 258, the Commission held that request of an employer that an award be made waived notice; the Appellate Division's opinion in Lawson v. Wallace & Keeney, 202 App. Div. 435; 114 S. B. 149, is of like tenor. Waiver is effective from and after the making of an award: Kraemer v. Mergenthaler Linotype Co., 198 App. Div. 60; 114 S. B. 121; Ryan v. Brooklyn-Manhattan Transit Corp., 215 App. Div. 845; 149 S. B. 267.

Excuse of failure to give written notice figured in the following cases:

Where there was delay in diagnosis: Featherly v. Parr, 256 App. Div. 864; 204 S. B. 354.

Where claimant was not aware of the seriousness of his injury: Gubin v. Lederman, 257 App. Div. 1091; 204 S. B. 354; Keaney v. Marshall Sanitarium, 259 App. Div. 945; 204 S. B. 356.

Where the employer knew of the incident in which claimant was alleged to have been injured and authorized herniotomy three months later, claimant having worked in the interim: Doyle v. Century Circuit, Inc., 256 App. Div. 1021; 259 App. Div. 765; 204 S. B. 348.

Where the employer had timely knowledge of accident: Cowles v. U. S. Rubber Products, 254 App. Div. 123; 279 N. Y. Rep. 589; 204 S. B. 134; Veres v. Lumen Bearing Co., 255 App. Div. 171; 204 S. B. 581; MacRae v. Tiger Supply Co., 256 App. Div. 869; Bogart v. Shepard Niles Crane & Hoist Corp., 255 App. Div. 170; 204 S. B. 349; Silbert v. Fetzer, 258 App. Div. 1014.

Where accident and proper medical treatment were established and the Industrial Board found that the employer was not prejudiced by lack of timely notice: Ditges v. Janaug, Inc., 257 App. Div. 1094; 204 S. B. 357; Keaney v. Marshall Sanitarium, 259 App. Div. 945; 204 S. B. 356.

Other cases. Immediate medical attention and subtlety of ensuing disease may excuse failure to give timely notice: Johnson v. Dahlstrom Metallic Door Co., 255 N. Y. Rep. 610; 185 S. B. 494; Talbot v. Kress, 273 N. Y. Rep. 512; 204 S. B. 353.

Excuse of failure to give written notice figured in Pilloud v. 350 Park Ave. Co., 274 N. Y. Rep. 514; 204 S. B. 350.

The question of inability to give notice is exemplified in Nieresdursen v. Clark & Son, 19 S. D. R. 532; 4 Bul. 167; 192 App. Div. 939; 114 S. B. 147; and Schneider v. N. Y. Merchandise Co., 226 App. Div. 710; 8 Ind. Bul. 579.

A carrier cannot plead that it has been prejudiced by failure of the employee to give notice: Lawson v. Wallace & Keeney, 27 S. D. R. 179; 202 App. Div. 435; 30 S. D. R. 68; 208 App. Div. 753; 239 N. Y. Rep. 540; 114 S. B. 149; ensuing upon the opinion and decision in Sicardi v. Sarnoff Hat Co., 176 App. Div. 13; 2 Bul. 151; 95 S. B. 321, the Legislature by L. 1918, ch. 634, struck out the words, "state fund, insurance company or"; but the Department of Labor should not question an employer on the subject of prejudice: Itzkowitz v. Finer & Bachrach, 218 App. Div. 440; 149 S. B. 261–263; compare also Carbino v. De Grasse Paper Co., 209 App. Div. 627; 133 S. B. 223; and cases reviewed in 161 S. B. 241, 242.

A referee's excuse of failure to give notice does not suffice; the Board must excuse: Hennessey v. Amalgamated State Quarries Co., 228 App. Div. 858; 9 Ind. Bul. 170; 232 App. Div. 860; 185 S. B. 491. Compare, however, § 19 of the Labor Law which states that a decision of the referee on a compensation claim shall be deemed the decision of the Industrial Board.

The radical amendments to this section effected May 13, 1918, by L. 1918, ch. 634, have rendered decisions and opinions prior to that date more or less obsolete. The law as it now stands, in view of such amendments, has been interpreted by opinions in Gibbons v. Continental Iron Works, 190 App. Div. 35; 98 S. B. 87; Insana v. Nordenholt Corp., 193 App. Div. 1; 106 S. B. 228; Lawson v. Wallace & Keeney, 202 App. Div. 435; 114 S. B. 149; Burgi v. Hoffman Brewing Co., 200

App. Div. 246; 118 S. B. 65; Hill v. Ancram Paper Mills, 202 App. Div. 36; 118 S. B. 153; Doherty v. Lupton Co., 203 App. Div. 378; 118 S. B. 173; Calderera v. Nathan & Co., 200 App. Div. 298; 123 S. B. 110; Hunko v. Buffalo Crushed Stone Co., 203 App. Div. 284; 123 S. B. 111; Cuccia v. Roberts Contracting Co., 204 App. Div. 653; 123 S. B. 109; Carbino v. De Grasse Paper Co., 209 App. Div. 627; 133 S. B. 222; La Graves v. Standard Oil Co., 211 App. Div. 221; 140 S. B. 224; Rechler v. Macy & Co., 212 App. Div. 136; 140 S. B. 227; Bellanca & Spencer Lens Co., 214 App. Div. 824; 140 S. B. 228; Harvey v. Knickerbocker Slate Co., 214 App. Div. 133; 140 S. B. 231; Finch v. Buffalo Envelope Co., 218 App. Div. 31; 149 S. B. 257; Itzkowitz v. Finer & Bachrach, 218 App. Div. 440; 149 S. B. 262; Ryan v. Brooklyn-Manhattan Transit Corp., 215 App. Div. 845; 149 S. B. 267; and Smith v. Nash Motor Corp., 233 App. Div. 296; 185 S. B. 494; compare also Kavanaugh v. G. E. Co., 192 App. Div. 934; 229 N. Y. Rep. 615; 98 S. B. 88; Johnson v. Dahlstrom Metallic Door Co., 255 N. Y. Rep. 610; 185 S. B. 494; Levine v. G. E. Co., 209 App. Div. 838; 215 App. Div. 736; 161 S. B. 238; Murphy v. Bedford, 246 App. Div. 871; 204 S. B. 355; and Tong v. Niagara Machine & Tool Works, 23 S. D. R. 156.

§ 19. **Physical examination.** An injured employee claiming or entitled to compensation shall submit to such physical examination as the commissioner or the board may require. The place or places shall be reasonably convenient for him. Such physician or physicians as the employee or carrier may select and pay for may participate in an examination if the employee or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which he may refuse to submit to examination. [*As redrafted by L.* 1922, *ch.* 615, *without substantive change.*]

See also § 13, subd. (d), § 13-a, subd. (4), above, §§ 19-a, 41 and Rule 11 of the Board's "Rules and Procedure," below.

For cases in which claimants refused to undergo medical treatment, see general notes under § § 13— 13-j, above, page 116.

§ 19-a. **No physician or surgeon** employed in the department for the purpose of making the examinations required by section nineteen of this chapter, shall, during such employment, be employed by or accept or participate in any fee from any insurance company authorized to write workmen's compensation insurance in this state or from any self-insurer, whether such employment or fee relates to a workmen's compensation claim or otherwise. Any physician or surgeon so employed in the department who violates the provisions of this section shall be guilty of a misdemeanor. [*As added by L.* 1927, *ch.* 496.]

Subd. 6 of § 10-a of the Labor Law applies this § 19-a to members of the Industrial Council.

§ 19-b. **Treatment by physicians in employ of department.** No doctor, physician or surgeon in the employ of the department shall solicit or treat any claimant under this chapter, or own or operate any clinic, giving baking and massage, physio-therapy, or other treatment to such claimants. Such doctors, physicians and surgeons shall not recommend that a claimant be treated by any particular physician or surgeon, or receive baking and massage, physio-therapy or other treatment from any particular person, clinic or

hospital. Any such physician or surgeon may recommend the necessary treatment needed and the referee shall direct the employer or carrier to provide such treatment, but the referee shall not designate a particular physician, surgeon, clinic or hospital to provide the treatment. The employer or carrier shall furnish the prescribed treatment and upon their failure so to do within five days after the direction is made, the claimant may secure the same at the expense of the employer or carrier. Any physician or surgeon so employed in the department who violates the provisions of this section shall be guilty of a misdemeanor. [*As added by L.* 1928, *ch.* 752.]

The employer or carrier may appeal to the Appellate Division from a referee's direction under this § 19-b to provide treatment: Rood v. Consolidated Rendering Co., 243 App. Div. 223; 185 S. B. 537.

Subd. 6 of § 10-a of the Labor Law applies this § 19-b to members of the Industrial Council.

This § 19-b does not apply to the medical department of the state insurance fund. Opinion of Attorney-General, July 10, 1928; nor does it prevent department examiners from suggesting specialists for diagnosis and consultation only: Opinion of Attorney-General, August 2, 1928.

§ 20. **Determination of claims for compensation.** At any time after the expiration of the first [1]seven days of disability on the part of an injured employee, or at any time after his death, a claim for compensation may be presented to the employer or to the [2]commissioner. The [3]board shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The [4]commissioner or board shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the [5]department. Immediately after such filing the commissioner shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the board shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law.[6] [7]All awards of the board shall draw interest from thirty days after the making thereof [8]except as provided in section twenty-seven of this chapter. [9]Whenever a hearing or proceeding for the determination of a claim for compensation is begun before a referee, pursuant to the provisions of this chapter or of section nineteen of the labor law, such hearing or proceeding or any adjourned hearing thereon shall continue before the same referee until a final determination awarding or denying compensation, except in the absence, inability or disqualification to act of such referee, or for other good cause, in which event such hearing or proceeding may be continued before another referee by order of the commissioner or board. [*As am'd by*

L. 1915, *ch.* 167; *L.* 1917, *ch.* 705; *L.* 1919, *ch.* 629; *L.* 1922, *ch.* 615; *L.* 1924, *ch.* 318; *L.* 1925, *ch.* 660; *L.* 1928, *ch.* 754; *L.* 1939, *chs.* 512 *and* 937.]

[1] Word "seven" substituted for word "fourteen" by L. 1924, ch. 318.

[2] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.

[3] Word "board" substituted for word "commission" by L. 1922, ch. 615.

[4] Words "commissioner or board" substituted for word "commission" by L. 1922, ch. 615.

[5] Word "department" substituted for word "commission" by L. 1922, ch. 615.

[6] Remainder of section 20 and § 20-a as added by L. 1915, ch. 167, and amended by L. 1919, ch. 629, providing compensation by agreements between employers and employees, stricken out by L. 1922, ch. 615.

[7] Words "All awards . . . making thereof" inserted by L. 1925, ch. 660.

[8] Words "except as provided in section twenty-seven of this chapter" inserted by L. 1939, ch. 937.

[9] Following sentence added by L. 1928, ch. 754.

Chapter 512, Laws of 1939, which amended this section was repealed by Chapter 937, Laws of 1939, as enacted at the extraordinary session of the legislature. Chapter 937 validated the acts and expenditures under Chapter 512 and re-enacted its provisions. See note under § 27, below.

Relative to interest on awards see earlier provision concluding § 24, page 174, also Rule 22, appended below.

Relative to time limit on filing claims see §§ 28, 115; relative to finality of Commission's decisions, § 23, note. The compensation procedure of the Commission and its successor, the Industrial Board, is further regulated by §§ 22, 116–125. Compare notes on evidence, procedure and findings under § 118.

The Board has jurisdiction to hear and determine equitable defenses: Royal Indemnity Co. v. Heller, 256 N. Y. 322; 185 S. B. 273.

For constitutionality of the provision that the decisions of the Board shall be final as to all questions of fact, see Whelan v. Iroquois Gas Corp., 232 App. Div. 861; 258 N. Y. Rep. 542; 188 S. B. 168.

The Court of Appeals has held that the Appellate Division was without power to reverse a finding of fact sustained by the evidence, or to direct the Industrial Board to make a finding not established as matter of law by the evidence. Daus v. Gunderman & Sons, Inc., 257 App. Div. 1094; 283 N. Y. 459; 204 S. B. 381.

Chapter 594, Laws of 1939, which provides that interest on judgments or accrued claims against a municipal corporation shall not exceed 4 per cent per annum held applicable to rate of interest to be paid by a municipal corporation in a workmen's compensation case even though the accident occurred prior to its enactment: Opinion of Attorney-General, February 9, 1940.

§ 21. **Presumptions.** In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary

1. That the claim comes within the provision of this chapter;

2. That sufficient notice thereof was given;

3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

4. That the injury did not result solely from the intoxication of the injured employee while on duty.

5. That the contents of verified medical and surgical reports introduced in evidence by claimants for compensation shall constitute prima facie evidence of fact as to the matter contained therein. [*Subd.* 5 *added by L.* 1923, *ch.* 568.]

For an additional presumption in occupational disease cases compare § 47.

References to court opinions and decisions under this section are in 162 S. B. 22, 179–181, 186, 188; 185 S. B. 475, 477-488 and 204 S. B. 363–374.

When may presumptions be invoked. The Department of Labor must be satisfied that an accident has happened before the presumptions established by § 21 can arise: Collins v. Brooklyn Union Gas Co., 171 App. Div. 381; 81 S. B. 100; Kelly v. Nichols, 199 App. Div. 870; 118 S. B. 125; Hyland v. Winant, 6 S. D. R. 304; Graffe v. Art Color Printing Co., 3 Bul. 157; 5 Bul. 27; 20 S. D. R. 441; 191 App. Div. 669; 229 N. Y. Rep. 627; 97 S. B. 30; 98 S. B. 96; Woodruff v. Comstock, 15 S. D. R. 648; 3 Bul. 158; 186 App. Div. 924; 97 S. B. 184; Daly v. U. S. Trucking Co., 248 N. Y. Rep. 515; 156 S. B. 79.

If "substantial evidence to the contrary" is produced, the burden of proof shifts to the claimant: Magna v. Hegeman Harris Co., 258 N. Y. 82; 185 S. B. 474. If testimony to the contrary is incredible, the presumptions operate: Boyle v. Yellow Taxi Corp., 235 App. Div. 877; affd., 260 N. Y. Rep. 575; 11 Ind. Bul. 419.

The presumptions of § 21 are as operative and binding in the court upon appeal as in the Commission: Rheinwald v. Builders' Brick & Supply Co., 168 App. Div. 433; 81 S. B. 59-70; compare also White v. N. Y. Central & H. R. R. Co., 2 S. D. R. 477, as affirmed by the New York courts without opinion, 169 App. Div. 903; 216 N. Y. 653; 81 S. B. 180; and by the Supreme Court of the United States with opinion, 243 U. S. 188; 97 S. B. 151.

It is not the law that mere proof of an accident without other evidence creates the presumption under this section that the accident arose out of and in the course of the employment. There must be some evidence from which the conclusion can be drawn that the injuries did arise out of and in the course of the employment. Daus v. Gunderman & Sons, Inc., 257 App. Div. 1094; 283 N. Y. 459; 204 S. B. 381.

Presumption under Subdivision 1. The constitutionality of the presumption in subd. 1 is upheld in McQueeney v. Sutphen & Myer, 167 App. Div. 528; 81 S. B. 31, 392. Such presumption "does not permit the words of the statute to be warped from their usual and ordinary meaning": Tomassi v. Christensen, 171 App. Div. 284; 81 S. B. 104.

Defendant must offer evidence to the Commission; otherwise the claim is presumptively legal: McQueeney v. Sutphen & Myer, 167 App. Div. 528; 81 S. B. 31, 392; Kohler v. Frohmann, 167 App. Div. 533; 81 S. B. 394; Powley v. Vivian & Co., 169 App. Div. 177; 81 S. B. 70.

Under subd. 1, the employer and carrier must prove that the employment was not covered by the law or that the accident did not arise out of and in the course of it. The employer proved want of coverage in Gleisner v. Gross & Herbener, 170 App. Div. 37; 81 S. B. 89; Fitzsimmons v. Wadsworth, 8 S. D. R. 351; 177 App. Div. 938; 95 S. B. 346; and Herman v. Wolff, 18 S. D. R. 609, cases in which the injured employees had two duties, one covered and the other not. For decisions with opinions affirming awards in cases of unwitnessed accident see Norris v. N. Y. Central R. R. Co., 220 App. Div. 359; 246 N. Y. 307; 156 S. B. 301; Vincent v. N. Y. Rapid Transit Corp., 223 App Div. 153; 156 S. B. 306; Fleming v. Gair Co., 10 S. D. R. 564; 176 App. Div. 23; 87 S. B. 241; Chludzinski v. Standard Oil Co., 176 App. Div. 87; 87 S. B. 163; Driscoll v. Gillen & Son, 187 App. Div. 908; 226 N. Y. Rep. 568; 95 S. B. 348; Smith v. Oesterheld & Son, 189 App. Div. 384; 97 S. B. 109; and Vogel v. American Chicle Co., 190 App. Div. 797; 98 S. B. 7. For decisions with opinion in cases in which the employers proved that unwitnessed accident did not arise out of and in the course of the employment see Gifford v. Patterson, 179 App. Div. 420; 222 N. Y. 4; 87 S. B. 154; Whalen v. Stanwood Towing Co., 186 App. Div. 190; 95 S. B. 350; Russo v. Jarvis Stores, 193 App. Div. 587; 114 S. B. 159; Michelov v. Century Metal S. & S. Co., 23 S. D. R. 163; 193 App. Div. 814; 106 S. B. 95; and Cooley v. Heany Co., 249 N. Y. 395; 161 S. B. 233; Donohue v. Yonkers Sash Weight Corp., 249 App. Div. 473 (opinion); aff'd 275 N. Y. Rep. 566; 204 S. B. 363. For additional cases see 204 S. B. 363-374.

Given an accident and a subsequent disability presumption is that the disability is a consequence of the accident: Butera v. Morse D. D. & R. Co., 20 S. D. R. 418; 4 Bul. 176; 98 S. B. 94.

Given an accident to the chest and death from pneumonia four days thereafter, presumption is that the disease and death are consequences of the accident: Delso v. Crucible Steel Co., 21 S. D. R. 590, 5 Bul. 95; 195 App. Div. 288; 106 S. B. 206; 114 S. B. 161; but compare Bowman v. Gibson, 194 App. Div. 855; 106 S. B. 214.

Under subd. 1 the liberality of the law relative to claim has been noted in Kaplan v. Kaplan Knitting Mills Co., 248 N. Y. 10; 156 S. B. 291; and claim of death benefits has been presumed in Hansen v. Flinn-O'Rourke, 192 App. Div. 878; 114 S. B. 86.

The carrier failed to overcome this presumption in the following cases contested on ground that the accidents did not arise out of and in the course of the employment: Birch v. Budd, 256 App. Div. 53; 204 S. B. 107; Ganshaves v. Myers-Lipman Wool Stock Co., Inc., 257 App. Div. 1085; 204 S. B. 367; Penn v. Lewis, 284 N. Y. Rep. 614; 259 App. Div. 944; 204 S. B. 76; Klein v. Queens Theatre & Century Circuit, Inc., 261 App. Div. 1024. For a case to the contrary, see Daus v. Gunderman & Sons, Inc., 257 App. Div. 1094; 283 N. Y. 459: 204 S. B. 381.

For a case involving the unwitnessed death of a watchman upon a derrick near a sea wall reached by means of a row boat, see Heikkila v. Steers, Inc., 261 App. Div. 1012. For unwitnessed drowning of a barge captain who left home intending to return to the barge, see Swanson v. Val Line, Inc., 262 App. Div. 788.

For a case involving the unwitnessed death of a railroad employee, see Chervinski v. Lehigh Valley R. R. Co., 260 App. Div. 292; 204 S. B. 365; 285 N. Y. Rep. —.

Presumption under Subdivision 2. Under subd. 2 the notice presumed to have been given is the written notice of § 18: Dorb v. Stearns & Co., Case No. 5795; 180 App. Div. 138; 95 S. B. 329; compare Commission's form of statement relative to presumption of notice in Haley v. Boston & Albany R. R., 16 S. D. R. 518; 186 App. Div. 926; 225 N. Y. Rep. 669; 95 S. B. 353; and Brockelbank v. Funk, 15 S. D. R. 651; 3 Bul. 156; 186 App. Div. 924; 95 S. B. 353. Compare dissenting opinion in Seidenzahl v. Beaulieu Vineyard Dist. Co. upon use of this form: 188 App. Div. 938; 95 S. B. 353.

Presumption under Subdivision 3. Under subd. 3, question of intent and question of the aggressor in a quarrel sometimes makes a case so close that the presumption turns the scale for the injured employee, as in Slane v. Cording & Salzman, 11 S. D. R. 631; 2 Bul. 9, 64; 179 App. Div. 952; 87 S. B. 145. Presumption against suicide was held to be overcome in Dubinsky v. Kofsky & Gilman, 226 N. Y. Rep. 631; 185 S. B. 478.

The carrier succeeded in overcoming the presumption against suicide in Bair v. Feer Realty Corp., 253 App. Div. 553; 279 N. Y. Rep. 590; 204 S. B. 372, but failed to overcome it in Sullivan v. Casimir Co., Inc., 258 App. Div. 830; 204 S. B. 371.

For additional cases involving the presumption against suicide, see 204 S. B. 370–373.

Compare notes on intention to injure under § 10, above.

Presumption under Subdivision 4. Under subd. 4, charges of intoxication are not likely to avail if the accident has been without witness: Sorge v. Aldebaran Co., 3 S. D. R. 390; 171 App. Div. 959; 218 N. Y. Rep. 636; 95 S. B. 355; Burns v. Products Co., Case No. 3278; 181 App. Div. 910; 223 N. Y. Rep. 684; 87 S. B. 201. Compare notes on intoxication under § 10 above.

Presumption under Subdivision 5. Under subd. 5, acceptance of a verified report in face of direct testimony contrary thereto arbitrarily extends the limited presumption of the statute: Magna v. Hegeman Harris Co., 258 N. Y. 82; 185 S. B. 474; Walters v. Goldberger-Raabin Co., 236 App. Div. 867; 11 Ind. Bul. 447.

Award was reversed for lack of proper evidence and the matter remitted for an unverified medical report in the record to be properly sworn to in Thompson v. Mason, Au & Magenheimer, 253 App. Div. 854; 204 S. B. 579.

A dentist is qualified to give proof of dental injuries in compensation cases which he is called upon to treat: Opinion of Attorney-General, November 2, 1936.

§ 22. **Modification of [1]awards, [2]decisions or orders.** Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions [3]or proof of erroneous wage rate, the [4]board may at any time, [5]subject to the limitations set forth in sections twenty-five-a and one hundred and twenty-three of this chapter, review any award, [6]decision or order and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys already paid,[7] except that an award increasing the compensation rate may be made effective from date of injury, and except that if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the board. [*As am'd by L.* 1922, *ch.* 615; *L.* 1928, *ch.* 754; *L.* 1940, *ch.* 686.]

[1] Word "awards" substituted for word "award" by L. 1940, ch. 686.
[2] Words "decisions or orders" added by L. 1940, ch. 686.
[3] Words "or proof of erroneous wage rate" inserted by L. 1928, ch. 754.
[4] Word "board" substituted for word "commission" by L. 1922, ch. 615.
[5] Clause "subject to . . . of this chapter" inserted by L. 1940, ch. 686.
[6] Words "decision or order" inserted by L. 1922, ch. 615.
[7] Remainder of section substituted by L. 1928, ch. 754, for words "except that an award for increased wages under subdivision five of section fourteen may be made effective from date of injury" which words were added by L. 1922, ch. 615.

Compare Labor Law, § 19. For statistical review of adjudications by the Board, see Annual Reports of Industrial Commissioner.

References to court opinions and decisions under this section are in 162 S. B. 192–194. See also 185 S. B. 344, 512–534, 544 and 204 S. B. 374–376.

Section 15, subd. 6-a, §§ 22, 23 and 123 are to be read together.

POWERS OF INDUSTRIAL BOARD

Lump sum payment. The Industrial Board may direct payment of a lump sum to dependent parents from the Aggregate Trust Fund into which death benefits have been paid: Pocoroba v. May Co., 253 App. Div. 407; 204 S. B. 425.

Reimbursement from special funds. The Industrial Board may decree reimbursement out of the "special funds" where award was erroneously charged against a carrier and paid by it: McDonnell v. City of New York, 253 App. Div. 559; 204 S. B. 375.

Review by Board—number of members required. One Board member has power to act for the Board in a review of a referee's decision: Algeri v. Brady & Gioe, Inc., 255 App. Div. 907; 204 S. B. 374.

Revisory powers. The Board may review its findings or orders notwithstanding the clause of § 23 which declares that they shall be final: Schaefer v. Buffalo Steel Car Co., 250 N. Y. 507; 161 S. B. 251; Bechmann v. Oelerich & Son, 174 App. Div. 353; 95 S. B. 357; Kriegbaum v. Buffalo Wire Works, 182 App. Div. 448; 224 N. Y. Rep. 621; 95 S. B. 358; Spaduccino v. Hayes & Co., 180 App. Div. 37; 223 N. Y. Rep. 681; 95 S. B. 366; Eggleston v. Shinola Co., Case No. 20799; 191 App. Div. 930; 229 N. Y. Rep. 622; 114 S. B. 167; Bates v. Elgar, 186 App. Div. 926; 95 S. B. 366; Fischer v. Genesee Construction Co.,

17 S. D. R. 616; 3 Bul. 266; 187 App. Div. 850; 97 S. B. 174; and notwithstanding the phrase "on the ground of a change in conditions" in § 22: Poiucci v. Norris Co., 195 App. Div. 805; 114 S. B. 163; Metcaif v. Firth Carpet Co., 196 App. Div. 790; 114 S. B. 167; Biattner v. Pa Pro Co., 14 S. D. R. 669; 3 Bui. 52; 185 App. Div. 900; 95 S. B. 373; McCaii v. Hecht, 17 S. D. R. 653; 4 Bul. 22; and notwithstanding the case has been closed by award and payment of a lump sum: Metcalf v. Firth Carpet Co., 196 App. Div. 790; 114 S. B. 166; and notwithstanding a case has been carried to the courts: McNaiiy v. Diamond Miiis Paper Co., 9 S. D. R. 352; McCail v. Hecht, 17 S. D. R. 653; 4 Bui. 22. It has reviewed cases decided by the Court of Appeais, nameiy, Skarpeietzos v. Counes & Raptis Corp., 185 App. Div. 900; 224 N. Y. Rep. 606; 188 App. Div. 942; 228 N. Y. 46; 98 S. B. 33; and Whitmyre v. International Business Machines Corp., 267 N. Y. 28; 185 S. B. 489; 249 App. Div. 678; 274 N. Y. 61; 204 S. B. 351.

A decision of the Appeliate Division is not res judicata and binding upon the Board if sufficient facts are presented to justify a change: Di Donato v. Rosenberg, 256 N. Y. 412; 185 S. B. 513; McMahon v. Gretzuia, 238 App. Div. 877; 185 S. B. 282. The Board shouid not disturb its decisions "except for some compelling reasons in order to prevent a miscarriage of justice or a manifest wrong:" Fischer v. Genesee Const. Co., 187 App. Div. 850; 97 S. B. 174; it cannot resume jurisdiction over a ciaim withdrawn and outlawed by time: Joyce v. Eastman Kodak Co., 238 N. Y. 142; 133 S. B. 227; nor annui an assignment of cause of action under § 29: Sabatino v. Crimmins Construction Co., 102 Misc. 172; 87 S. B. 268. The courts heid that the Department had iost jurisdiction to review the dock accident case, Anderson v. Johnson Lighterage Co., 214 App. Div. 743; 241 N. Y. Rep. 523; 149 S. B. 277.

The Commission's discretion to refuse a request for review is defined in Clemens v. Ciemens & Greii (No. 2), 180 App. Div. 92; 95 S. B. 381; and Schienker v. Garford Motor Truck Co., 173 App. Div. 166; 95 S. B. 365. No appeal lies from a deniai of appiication to reopen: Strand v. Harris Structural Steel Co., 234 App. Div. 341; 185 S. B. 540; Mittiga v. U. S. Aiuminum Co., 227 App. Div. 680; 185 S. B. 539. In Wiiiiams v. Roth, 245 App. Div. 874; 249 App. Div. 887; 204 S. B. 392, the Board refused to review an originai award on the question of rate after five years' payment and upon cessation of payment thereafter imposed a penalty of ten per cent.

In revising awards the Commission should use the same methods and legai formalities (§ 20) as in the original making of them: Sperduto v. N. Y. City Interborough Ry. Co., 226 N. Y. 73; 95 S. B. 170, 177; Fischer v. Genesee Const. Co., 187 App. Div. 850; 95 S. B. 368.

The Department sometimes reconsiders and reverses its action in a particular case in the light of subsequent court decision in a similar case; examples are Eldridge v. Endicott, Johnson & Co., 19 S. D. R. 431; 4 Bui. 53; 189 App. Div. 53; 228 N. Y. 21; 97 S. B. 32; 106 S. B. 41; Blattner v. Pa Pro Co., 14 S. D. R. 669; 3 Bul. 52; 185 App. Div. 900; 95 S. B. 373; Lupke v. Simon, 11 S. D. R. 617; 2 Bul. 45; 95 S. B. 372; Junk v. Terry & Tench Co., 16 S. D. R. 495; 3 Bui. 201; Iaconimi v. O'Rourke Contracting Co., 16 S. D. R. 449.

Insertion in the section of the words "decision or order," by L. 1922, ch. 615, offsets effect of the opinion in Coniey v. Upson Co., 197 App. Div. 815; 114 S. B. 164; the court did not sanction that opinion: Cohen v. Ashford Piumbing Co., 203 App. Div. 261; 235 N. Y. Rep. 576; 123 S. B. 117.

The amendments effected by L. 1928, ch. 754, offset decision in Solotar v. Neuglass & Co., 228 N. Y. Rep. 508; 98 S. B. 100. The law as it stood did not forbid lengthening of the period of a proportionate ioss award: Toiioid v. Hopeman & Sons, 209 App. Div. 719; 240 N. Y. Rep. 550; 133 S. B. 229. The Board may increase award for disfigurement: Meadows v. Laundry Trucking Co., 236 App. Div. 767; 11 Ind. Bul. 419. A carrier having paid award of $100 to the State Treasurer in 1918, in accordance with subd. 7, now subd. 8 of § 15, the Appeliate Division affirmed a decision rescinding the award ten years later and directing the State Treasury to repay the $100 to the carrier: Converso v. Union Bag & Paper Co., 220 App. Div. 788; 156 S. B. 310.

RETROACTIVITY

Chapter 754, Laws of 1928, which amended § 22 to provide that upon proof of erroneous wage rate, "An award decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation," was held applicable even though the accident occurred prior to its enactment: Glass v. Hudson Glass Co., 259 App. Div. 947; 204 S. B. 375. See also Callari v. N. Y. State Rys., 246 App. Div. 332; 272 N. Y. Rep. 656; 204 S. B. 298.

§ 23. **Appeals.**[1] An award or decision of the board shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided. Within thirty days after notice of the filing of the award or the decision of the [2]board has been sent to the parties an appeal may be taken to the appellate division of the supreme court, third department, from such award or decision by any party in interest including an employer insured in the state fund; [3]but if any party shall within twenty days after notice of the filing of such award or decision, make an application in writing to the board for a modification or rescission or review of such award or decision of a referee, as provided in section nineteen of the labor law, an appeal may thereafter be taken to the appellate division of the supreme court, third department, from such award or decision by any party in interest within twenty days after notice of the filing of the decision of the board upon such application. If notice of such appeal is served upon the [2]board, the [2]board shall within [4]sixty days thereafter serve upon the parties in interest [5]and file its findings of fact and rulings of law in such case. The [2]board may also, in its discretion certify to such appellate division of the supreme court, questions of law involved in its decision. Such appeals and the questions so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court. The [2]board shall be deemed a party to every such appeal, and the attorney-general, without extra compensation, shall represent the [2]board thereon. An appeal may also be taken to the court of appeals in all cases where the decision of the appellate division is not unanimous and by the consent of the appellate division or [6]the court of appeals where the decision of the appellate division is unanimous in the same manner and subject to the same limitations not inconsistent herewith as is now provided in civil actions. It shall not be necessary to file exceptions to the rulings of the [2]board. [7]Neither the commissioner, the board, [8]the commissioners of the state insurance fund nor the claimant shall [9]be required to file a bond upon an appeal [10]to the court of appeals. Otherwise such appeals shall be subject to the law and practice applicable to appeals in civil actions. Upon final determination of such an appeal, the [2]board shall enter an order in accordance therewith. [11]Whenever a notice of appeal is served or an application made to the board by the employer or insurance carrier for a modification or rescission or review of an award or decision, and

the board shall find that such notice of appeal was served or such application made for the purpose of delay or upon frivolous grounds, the board may in its discretion impose a penalty in an amount not exceeding twenty-five dollars upon the employer or insurance carrier, which penalty shall be added to the compensation and paid to the claimant. The penalties provided herein shall be collected in like manner as compensation. A party against whom an award of compensation shall be made may appeal from a part of such award. In such a case the payment of such part of the award as is not appealed from shall not prejudice any rights of such party on appeal, nor be taken as an admission against him.

[12]Where a notice of appeal has been served and findings of fact and rulings of law have been prepared and served upon the parties in interest, no withdrawal of such appeal shall be effective unless the appellant shall pay to the attorney-general of the state of New York, as attorney for the industrial board, the sum of ten dollars, as costs on such appeal. [*As am'd by L.* 1916, *ch.* 622; *L.* 1917, *ch.* 705; *L.* 1922, *ch.* 615; *L.* 1928, *ch.* 754; *L.* 1935, *chs.* 648, 680; *and L.* 1938, *ch.* 585.]

[1] Words "from the commission" stricken out by L. 1922, ch. 615.
[2] Word "board" substituted for word "commission" by L. 1922, ch. 615.
[3] Words "but if . . . such application" inserted by L. 1928, ch. 754.
[4] Word "sixty" substituted for "thirty" by L. 1935, ch. 680.
[5] Words "and file its findings" substituted for words "a statement of its conclusions" by L. 1922, ch. 615.
[6] Words "a judge of" stricken out by L. 1922, ch. 615.
[7] Words "Neither the commissioner, the board nor the claimant" substituted for words "The commission" by L. 1922, ch. 615.
[8] Words "the commissioners . . . fund" inserted by L. 1938, ch. 585.
[9] Word "not" stricken out by L. 1922, ch. 615.
[10] Words "by it" stricken out by L. 1922, ch. 615.
[11] Words "Whenever . . . against him" added by L. 1928, ch. 754.
[12] Sentence "Where a . . . such appeal" added by L. 1935, ch. 648.

Chapter 680 of L. 1935 does not repeal Chapter 648 of L. 1935: Opinion of Attorney-General, November 4, 1935.

Relative to finality of the Commission's awards or decisions, § 15, subd. 6-a, and §§ 22, 23 and 123 are to be read together; compare notes under § 22.

References to court opinions and decisions under this § 23 are in 162 S. B. 195–197, 246, 185 S. B. 563, and 204 S. B. 378–387.

For statistics of review by the Industrial Board, see Annual Report of Industrial Commissioner.

Under § 164 of the Civil Practice Act an appellant has three days additional time, or thirty-three days in all, in which to serve notice of appeal: Adams v. Atlanta Construction Co., 198 App. Div. 430; 114 S. B. 173.

The court's opinion in a case may or may not state correct reasons for the decision; the decision itself, embodied in the order, is the official record: Opinion of Attorney-General, March 17, 1931.

When the Commission reviews a case appeal from which is pending, it should make a new award or decision and give due notice to the parties: Behrens v. Stevens Co., 188 App. Div. 66; 95 S. B. 381; Brown v. O'Brien & Sons, 226 App. Div. 828; 161 S. B. 254.

The courts will be liberal relative to the form of notice of appeal: Prendergast v. Berrian Bros., 184 App. Div. 240; 95 S. B. 379.

Court review of evidence. The right of the courts to review the Commission's rulings or decisions is restricted by the sentence in § 20, which

declares: "The decision of the commission shall be final as to all questions of fact, and except as provided in section twenty-three, as to all questions of law." The provision making the board's decisions final as to questions of fact is constitutional: Dahlstrom Metallic Door Co. v. Industrial Board of N. Y., 284 U. S. 594; 256 N. Y. 199; 177 S. B. 270; Whelan v. Iroquois Gas Corp., 258 N. Y. Rep. 542; 188 S. B. 168. "If there are no facts . . . a question of law arises" and the courts may review: Rhyner v. Hueber Building Co., 171 App. Div. 58; 81 S. B. 375. Other cases relative to court review of evidence in compensation cases are: Love v. Thatcher Mfg. Co., 251 App. Div. 47; 204 S. B. 572; motion to dismiss appeal granted, 275 N. Y. Rep. 533; Daus v. Gunderman & Sons, Inc., 257 App. Div. 1094; 283 N. Y. 459; 204 S. B. 381; Carroll v. Knickerbocker Ice Co., 169 App. Div. 450; 218 N. Y. 435; 81 S. B. 381; Haverhals v. Badman, 243 App. Div. 848; 244 App. Div. 839; 268 N. Y. Rep. 660; 14 Ind. Bul. 280; Goldstein v. Centre Iron Works, 167 App. Div. 526; 81 S. B. 366; Gardiner v. Horseheads Construction Co., 171 App. Div. 66; 81 S. B. 374; Campbell v. Clausen-Flanagan Brewery, 183 App. Div. 499; 97 S. B. 23; Nestor v. Pabst Brewing Co., 191 App. Div. 312; 24 S. D. R. 76; 195 App. Div. 434; 98 S. B. 78; Donovan v. Alliance Electric Co., 191 App. Div. 303; 195 App. Div. 678; 98 S. B. 82; and Kade v. Greenhut Co., 193 App. Div. 862; 114 S. B. 170.

Credibility of a witness is a question of fact under § 20: Benjamin v. Rosenberg Bros., 13 S. D. R. 525; 2 Bul. 126, 147; 180 App. Div. 234; 223 N. Y. Rep. 569; 95 S. B. 203; Banaski v. American Car & Foundry Co., 211 App. Div. 820; 133 S. B. 230.

The Court of Appeals reduced an award of $302.40 to $150 in Mariano v. Krasnoger Bros., 228 N. Y. Rep. 609; 106 S. B. 127.

Interlocutory orders. Appeals cannot be taken from interlocutory proceedings of the Department: Sperduto v. N. Y. City Interborough Ry. Co., 226 N. Y. 73; 95 S. B. 177; Sparone v. General Electric Co., 203 App. Div. 273; 123 S. B. 121; Lepow v. Lepow Knitting Mills, Inc., 261 App. Div. 1013; but see Barbarie v. Emulso Corp., 260 App. Div. 819; or from orders of the Appellate Division that are not final: Falk v. Midland Dairy Co., 266 N. Y. Rep. 559; 185 S. B. 541; 188 S. B. 70; Coleman v. Cating Rope Works, 273 N. Y. Rep. 461; 16 Ind. Bul. 85.

For additional cases, see 204 S. B. 377–381.

Parties in interest—defined. Under the law as it read before July 1, 1935, effective date of ch. 258 of the Laws of 1935, amending §§ 13 and 24 and adding §§ 13-a and 13-j of the Workmen's Compensation Law, the Appellate Division held that a physician employed by the employer was not "a party in interest" who might take appeal from an award or decision under the Workmen's Compensation Law: Lewis v. Lefren, 234 App. Div. 513; 185 S. B. 37. Upon authority of its decision in the Lewis case, the court later held that an attorney whose fee was fixed by the Industrial Board under § 24 could not appeal to the courts: Finnegan v. Catholic Charities, 236 App. Div. 767; 11 Ind. Bul. 387. However it later held to the contrary relative to attorney's fee in Leedy v. State Industrial Board, 241 App. Div. 643; 185 S. B. 537, 538. Decision in the Lewis case still applies to accidents occurring outside the State of New York (§ 13, Subd. (b), § 24). Fees of physicians in cases of accident occurring within the State are now governed by Subd. (3) of § 13-a and Subd. 2 of § 13-g which subject them to arbitration committee decisions in cases of dispute.

Appellants must serve notice of appeal upon all parties in interest, including claimants, otherwise the court will dismiss the appeal: McGuire v. New Haven Erection Co., 203 App. Div. 1; 114 S. B. 172.

"Poor person" appeals. Sections 199 and 558 of the Civil Practice Act, as amended by Chapter 722 of the Laws of 1935, define poor persons, permit them to submit typewritten briefs and free them from payment of fees. For cases, see 204 S. B. 385.

Record on appeal. The Appellate Division has pointed out methods of shortening the records and lessening printing bills upon appeals in Coyle v. Howell, Fields & Goddard, 228 App. Div. 388; 185 S. B. 541, 542. See Rule 19

(e) enacted in pursuance of its suggestions, appended below. See also MacConel v. Union Coal & Ash Co., 230 App. Div. 336; 185 S. B. 543. The contents of the record were decisive in Werenjchik v. Uien Contracting Corp., 255 N. Y. 56, 411; 185 S. B. 545, 546. Omission of evidence from the record figured in Angelo v. Strauchen, 230 App. Div. 134; 185 S. B. 544.

The court will not assume to determine what should be omitted from the record or condensed therein. The record on appeal should be settled in the first instance by the Board or by stipulation between the parties. Downes v. Lauder, 261 App. Div. 1009.

Printing of the record on cross-appeals was the question in Matessa v. Pennsylvania R. R. Co., 261 App. Div. 1020, in which the employer contended that the claimant was injured while engaged in interstate commerce and the claimant contended that his compensation rate was inadequate and his disability classification improper. Held (1) that it is the province of the Board to settle records on appeal in the first instance, (2) that the employer should not be required to print more of a record than is necessary to disclose its own assertion of error, and (3) that if the claimant has no funds to print that part of the record which is necessary for his appeal, he should apply to the court for leave to prosecute the cross appeal upon typewritten record.

Right of appeal. Appeal to the Court of Appeals from unanimous reversal by the Appellate Division is a constitutional right: Fineman v. Camp Ga-He-Ga, 258 N. Y. 423; 185 S. B. 541.

Appeal cannot be taken to the Court of Appeals from an Appellate Division decision answering a certified question: Matter of Resolution State Industrial Comm., 224 N. Y. 13; 95 S. B. 375; Kifer v. Buffalo Chair Works, 11 S. D. R. 642, 2 Bul. 66. Previously to amendment of this section by L. 1917, ch. 705, an employer insured in the state fund could not appeal from the Commission to the courts: Crockett v. International Railway Co., 170 App. Div. 122; 81 S. B. 398. The state fund has the same right to appeal as any other carrier: Opinion of Attorney-General, June 8, 1937. The amendment of § 23 by L. 1916, ch. 622, regulating appeals from the Appellate Division to the Court of Appeals, may be read in connection with Hartnett v. Steen Co., 216 N. Y. 101; 81 S. B. 401. The law applicable to appeals in civil actions is Article 38 of the Civil Practice Act, as based on the Constitution of New York, Article 6, §§ 3, 7; final orders thereunder are interpreted in Neglia v. Zimmerman, 237 N. Y. 131; 123 S. B. 123; and Bogold v. Bogold Bros., 245 N. Y. Rep. 574; 156 S. B. 312; a compensation claimant need not give security to perfect an appeal to the Court of Appeals when the decision of the Appellate Division has not been unanimous or when the decision has been unanimous and the Appellate Division or a judge of the Court of Appeals has consented to an appeal: Civil Practice Act, § 593. The amendment relative to filing exceptions and bond is in line with the decision in Kenny v. Union Ry. Co., 166 App. Div. 497; 81 S. B. 400.

The courts will not hear appeal from an award made after the claimant's death, no substitution having been made: O'Esau v. Bliss Co., 224 N. Y. Rep. 701; 19 S. D. R. 444; 186 App. Div. 556; 95 S. B. 377; Waite v. Bliss Co., 186 App. Div. 398; 95 S. B. 378.

An employer or carrier may appeal from a referee's direction to provide medical care: Rood v. Consolidated Rendering Co., 243 App. Div. 223; 185 S. B. 537.

A claimant denied compensation for want of coverage can appeal to the Appellate Division, Third Department, or bring an action for negligence in a court of competent jurisdiction: Naud v. King Sewing Machine Co., 95 Misc. 676; 178 App. Div. 31; 223 N. Y. Rep. 567; 95 S. B. 383.

Upon appeal, the Appellate Division, Second Department, held that the Supreme Court, Kings County, had been without jurisdiction to entertain an action to determine the validity and reasonableness of a ruling of the Board interpretative of the Workmen's Compensation Law, the court below having held with opinion that the Appellate Division, Third Department, did not have exclusive jurisdiction of the question; and the Court of Appeals affirmed the Appellate Division's judgment: Brookiyn Children's Aid Society v. Industrial Board, 136 Misc. 379; 231 App. Div. 845; 256 N. Y. Rep. 651; 185 S. B. 536; compare Royal Indemnity Co. v. Heller, 256 N. Y. 322, 327; 185 S. B. 535.

The Appellate Division dismissed an appeal by an employer and carrier from a denial of award for want of coverage: Avery v. Sherwood Shoe Co., 194 App. Div. 949; 114 S. B. 174; and an appeal by claimant from a denial of an application to reopen: Mittiga v. U. S. Aluminum Co., 227 App. Div. 680; 185 S. B. 539.

A carrier opposing its assured employer on ground of policy cancellation, or on other ground, should give such employer full notice; for failure so to do the Appellate Division dismissed carriers' appeals in Hammele v. McMahon, 220 App. Div. 60; 156 S. B. 255; Zaro v. Zaro T. & S. Ticket Agency, 222 App. Div. 700; 156 S. B. 255; Boos v. Boos, 222 App. Div. 705; 161 S. B. 228; and DeRose v. Stento, 228 App. Div. 867; 9 Ind. Bul. 171; and remitted Szabo v. Standard Commercial Body Corp., 221 App. Div. 722; 156 S. B. 255.

§ 24. **Costs and fees.** If the [1]court before which any proceedings for compensation or concerning an award of compensation have been brought, under this chapter, determine that such proceedings have not been so brought upon reasonable ground, it shall assess the [2]cost of the proceedings upon the party who has so brought them. Claims of attorneys and counselors-at-law for legal services in connection with any claim arising under this chapter, and claims for services or treatment rendered or supplies furnished pursuant to [3]subdivision (b) of section thirteen of this chapter, shall not be enforceable unless approved by the [4]board. If so approved, such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the [4]board. Any other person, firm or corporation who shall exact or receive fee or gratuity for any services rendered on behalf of a claimant except in an amount determined by the [4]board, shall be guilty of a misdemeanor. Any person, firm or corporation who shall solicit the business of appearing before the [4]board on behalf of a claimant, or who shall make it a business to solicit employment for a lawyer in connection with any claim for compensation under this [5]chapter shall be guilty of a misdemeanor. In case an award is affirmed upon an appeal to the appellate division, the same shall be payable with interest thereon from the date when said award was made by the [4]board [6]except as provided in section twenty-seven of this chapter. [*As am'd by L.* 1917, *ch.* 705; *L.* 1920, *chs.* 281, 529; *L.* 1922, *ch.* 615; *L.* 1935, *ch.* 258; *L.* 1939, *chs.* 512, 937.]

[1] Words "the board or" stricken out by L. 1935, ch. 258.
[2] Word "whole" stricken out by L. 1935, ch. 258.
[3] Words "subdivision (b) of" inserted by L. 1935, ch. 258.
[4] Word "board" substituted for word "commission" by L. 1922, ch. 615.
[5] Word "chapter" substituted for word "act" by L. 1922, ch. 615.
[6] Words "except as . . . this chapter" added by L. 1939, ch. 937.

Chapter 512, Laws of 1939, which amended this section was repealed by Chapter 937, Laws of 1939, as enacted at the extraordinary session of the legislature. Chapter 937 validated the acts and expenditures under Chapter 512 and reenacted its provisions. See note under § 27, below.

See also §§ 13, 13-a, 13-d, 13-f, 13-g, 13-i, 24-a, 25-a, 26 and § 50, subd. 3-b. Section 276 of the Penal Law prohibits fee splitting by attorneys.

Relative to interest on awards see later provision concluding § 20, above and Rule 22, appended below; relative to legal fees, Rule 18, appended below.

When appeals are brought upon reasonable ground, § 23, above, leaves assessment of costs to the court's discretion; ordinarily the court will not assess them against an unsuccessful claimant but will assess them against an unsuccessful employer or insurer; it will assess them against the Commission rather than against the unsuccessful claimant: Wilson v. Dorflinger & Sons, 218 N. Y. 120; 81 S. B. 494; Matter of Petrie, 218 N. Y. 116; 81 S. B. 405.

In an action to recover payments for medical treatment the court held that the approval of the Industrial Board is not required in cases coming within subdivision (c) of § 13, even though the payments for medical treatment were made prior to the passage of the 1935 amendment: Liberty Mutual Ins. Co. v. N. Y. & Queens E. L. & P. Co., 161 Misc. 491; 204 S. B. 388.

Evasion of the provision requiring approval of legal fees will be punished by court orders: Matter of Fisch, 4 Bul. 196; 188 App. Div. 525; 98 S. B. 53. Compare Matter of Levine, 210 App. Div. 8.

In common law action for legal fees for services in connection with a workmen's compensation claim, the court held that the Industrial Board's approval of such fees was a prerequisite: Bregoff v. Mitchell, 254 App. Div. 263; 204 S. B. 387.

Relative to assignment of fee, see Opinion of Attorney-General, January 13, 1934; to approval of Industrial Board for enforcement of claims for legal services, Id., April 24, 1936, and September 24, 1936.

The State Insurance Fund may pay costs and attorney's fees when employers insured in it appeal to the courts: Opinion of Attorney-General, February 7, 1933; but is not liable therefor when employers take appeal without its co-operation: Opinion of Attorney-General, November 17, 1932.

The provisions of this § 24 against soliciting are reenforced by §§ 270-a to 270-e, inclusive, of the Penal Law, enacted by L. 1935, ch. 578: Opinion of Attorney-General, September 17, 1935.

The Appellate Division, quoting § 19 of the Labor Law, affirmed award of interest from date of decision by a referee: Shepelowisch v. Benzing & Co., 233 App. Div. 324; 185 S. B. 246.

§ 24-a. **Representation before the industrial board.** No person, firm or corporation, other than an attorney and counsellor-at-law, shall appear on behalf of any claimant or person entitled to the benefits of this chapter, before the industrial board or any officer, agent or employee of the department assigned to conduct any hearing, investigation or inquiry relative to a claim for compensation or benefits under this chapter, unless he shall be a citizen of the United States, and shall have obtained from the commissioner a license authorizing him to appear in matters or proceedings before the department. Such license shall be issued by the commissioner upon recommendation of the board, and in accordance with the rules established by the board. The board, in its rules, shall provide for the issuance of licenses to representatives of charitable and welfare organizations, or to associations who employ a representative to appear for members of such association, upon certification of the proper officer of such association or organization, which licenses shall issue without charge; and may provide for a license fee in the case of all other persons, firms or corporations in an amount to be fixed by said rules, not exceeding the sum of one hundred dollars a year. [1]All license fees collected under the provisions of this section shall be paid into the special fund created pursuant to subdivision eight of section fifteen hereof. The board may further provide in its rules for such tests of character and fitness as it may deem necessary.

There shall be maintained in each office of the department a registry or list of persons to whom licenses have been issued as provided herein, which list shall be corrected as often as licenses are issued or revoked. Absence of a record of a license issued as herein provided shall be prima facie evidence that a person, firm or corporation is not licensed to represent claimants. Any such license may be revoked by the commissioner, for cause, and on the recommendation of the board, after a hearing before such board, shall be revoked by the commissioner. No license hereunder shall be issued for a period longer than one year from the date of its issuance. The provisions of this section shall not apply to a regular employee of a self-insured employer or of an insurance carrier appearing on behalf of his employer.

No fee or allowance, in accordance with the provisions of section twenty-four of this chapter, shall be made for services rendered by any such person, firm or corporation who has received a license hereunder without payment of a license fee. [*As added by L.* 1928, *ch.* 749; *and am'd by L.* 1930, *ch.* 521.]

[1] Sentence "All license . . . fifteen hereof" inserted by L. 1930, ch. 521.

Compare corresponding provisions regulating representation of self-insurers, § 50, subd. 3-b below. The Board's rule governing licenses under this section, Rule 20, appears in the Appendix, below. It fixes the fee at $50.

For statistical data of representation before the Board, see Annual Report of the Industrial Commissioner.

§ 25. **Compensation, how payable.** [1] The compensation herein provided for shall be paid periodically and promptly in like manner as wages, and as it accrues, and directly to the person entitled thereto without waiting for an award by the industrial board, except in those cases in which the right to compensation is controverted by the employer. The first payment of compensation shall become due on the [2]fourteenth day of disability on which date or within four days thereafter all compensation then due shall be paid, and the compensation payable bi-weekly thereafter; but the industrial board may determine that any payments may be made monthly or at any other period, as it may deem advisable. If the employer or insurance carrier does not controvert the injured workman's right to compensation such employer or insurance carrier shall, either on or before the [3]eighteenth day after disability, or within [4]eight days after the employer first has knowledge of the alleged accident, begin paying compensation[5] and shall immediately notify the commissioner in accordance with a form to be prescribed by him, that the payment of compensation has begun, accompanied by the further statement that the employer or insurance carrier, as the case may be, will notify the commissioner when the payment of compensation has been stopped. Immediately upon the stoppage or suspension of payments of compensation the employer or insurance carrier shall notify the

commissioner of such act on a form to be prescribed by him. In case the employer decides to controvert the right to compensation he shall, either on or before the [6]eighteenth day of disability or within ten days after he has knowledge of the alleged accident, file a notice with the commissioner, on a form prescribed by him, that compensation is not being paid, giving the name of the claimant, name of the employer, date of the alleged accident and the reason why compensation is not being paid. The commissioner may in the interest of justice at any time refer a case in which payments are being made as above to the industrial board for a hearing, and shall immediately upon receipt of notice from the injured workman, from the employer, or from the insurance carrier that the employee's right to compensation is controverted, or that payments of compensation have stopped or been suspended, make such investigations, or cause such medical examinations to be made, or refer the case for such hearings, as will properly protect the rights of both parties, either as to any compensation then due or as to any compensation that may become due in the future for temporary or permanent disability, and [7]shall promptly cause the resumption of payments in case the injured person is entitled thereto. If the employer or insurance carrier shall fail to pay any [21]instalments of compensation within [8]eighteen days after the same becomes due, there shall be paid by the employer or, if insured, his insurance carrier, an additional amount of ten per centum of the compensation then due which shall accrue for the benefit of the injured workman or his dependents and shall be paid to him or them with the compensation, unless such delay or default is excused by the industrial board upon the application of the employer or insurance carrier upon the ground that owing to conditions over which the employer or insurance carrier had no control, such payment could not be made. Nothing herein shall limit the right of the industrial board in a particular case to hold a hearing and make an award in accordance with other provisions of this chapter. No case shall be closed without notice to all parties interested and without giving to all such parties an opportunity to be heard. If the employer has made advance payments of compensation,[9] or has made payments to an employee in like manner as wages during any period of disability, he shall be entitled to be reimbursed out of an unpaid instalment or instalments of compensation due, provided his claim for reimbursement is filed before compensation is paid,[10] or, if insured, by the insurance carrier at the direction of the industrial board, unless he shall file a waiver of reimbursement with the commissioner, in which event compensation shall be paid to the claimant notwithstanding the advanced payments. An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the commissioner, whenever required. If the employer or his insurance carrier shall fail to make payments of compensation

according to the terms of the award [11]within ten days thereafter, except in case of an appeal, there shall be imposed a penalty equal to twenty per centum of the unpaid compensation which shall accrue to the benefit of the injured workman or his dependents and shall be paid to him or them.

[12]Whenever for any reason compensation payments cease, the employer or his insurance carrier shall within sixteen days thereafter, send to the commissioner a notice on a form prescribed by the commissioner that such payment has been stopped, which notice shall contain the name of the injured employee or his principal dependent, the date of accident, the date to which compensation has been paid and the whole amount of compensation paid, and in case the employer or his insurance carrier fail so to notify the commissioner of the cessation of payments within sixteen days after the date [13]on which compensation [14]has been paid, the commissioner [15]may, after a hearing, impose a penalty upon such employer or his insurance carrier [16]in an amount in his discretion not exceeding twenty-five dollars, one-half of which shall be paid into the special fund created under favor of numbered paragraph [17]eight of section fifteen herein and one-half of which shall be paid into the state treasury and be applicable to the expenses of the [18]department. [19]Such penalty shall be collected in like manner as an award of compensation. Whenever the commissioner may deem it advisable he may [20]require any employer or insurance carrier to make a deposit with the commissioner to secure the prompt and convenient payment of such compensation, and the commissioner shall have power to make payments therefrom upon any awards.

The industrial board, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee, or, in case of death, his dependents, provided the same shall be in the interests of justice. Such commutation shall be made according to the method prescribed in section twenty-seven of this chapter.

[22]No penalty shall be applicable against a municipal corporation or other political subdivision of the state because of delay in the payments of benefits to volunteer firemen.

[23]All awards of compensation required to be made to minors under this chapter shall be paid to or for the benefit of such minors. The industrial board may in its discretion require the appointment of a guardian, before making payments not otherwise directed to be paid by action of such board, where such award exceeds two hundred and fifty dollars. The industrial board may, when such course seems advisable, direct that funds, payable to or for the benefit of a minor, be paid for vocational training or maintenance of such minor supplementing payments made under subdivision nine of section fifteen hereof. The industrial board may adopt rules to carry out the provisions of this section, including provision for reports to the commissioner by a guardian of

the use of moneys paid to minors in accordance with this section. [*As am'd by L.* 1915, *ch.* 167; *L.* 1919, *ch.* 629; *L.* 1921, *ch.* 540; *L.* 1922, *ch.* 615; *L.* 1925, *ch.* 657; *L.* 1926, *ch.* 260; *L.* 1927, *ch.* 497; *L.* 1930, *ch.* 316; *and L.* 1935, *chs.* 384, 552.]

[1] Words "It is the purpose of this chapter that" stricken out by L. 1922, ch. 615.
[2] Word "fourteenth" substituted for word "twenty-first" by L. 1925, ch. 657.
[3] Word "eighteenth" substituted for word "twenty-fifth" by L. 1925, ch. 657.
[4] Word "eight" substituted for word "fifteen" by L. 1925, ch. 657.
[5] Words "either by agreement provided for in section twenty or under the provisions of section twenty-a" stricken out by L. 1922, ch. 615.
[6] Word "eighteenth" substituted for word "twenty-fifth" by L. 1925, ch. 657.
[7] Word "shall" inserted by L. 1925, ch. 657.
[8] Word "eighteen" substituted for word "twenty-five" by L. 1925, ch. 657.
[9] Words "as provided elsewhere in this chapter" stricken out by L. 1922, ch. 615; words "or has made . . . of disability" inserted by L. 1930, ch. 316.
[10] Words "or, if insured . . . advanced payments" inserted by L. 1930, ch. 316.
[11] Words "within ten days thereafter, except in case of an appeal" inserted by L. 1922, ch. 615.
[12] Words "Whenever for . . . stopped" substituted by L. 1926, ch. 260, for words "When the final payment is made or due the employer or his insurance carrier shall within sixteen days send to the commissioner a notice on a form prescribed by the commissioner that such final payment is due or has been made fulfilling completely the terms of the award."
[13] Word "on" substituted for word "to" by L. 1927, ch. 497.
[14] Words "is due or" stricken out by L. 1927, ch. 497.
[15] Words "may, after a hearing, impose a penalty upon" substituted for words "shall assess against" by L. 1927, ch. 497.
[16] Words "in an amount in his discretion not exceeding twenty-five" substituted for words "the sum of one hundred" by L. 1927, ch. 497.
[17] Word "eight" substituted for word "seven" by L. 1922, ch. 615.
[18] Word "department" substituted for word "commission" by L. 1922, ch. 615.
[19] Sentence "Such penalty . . . of compensation" inserted by L. 1927, ch. 497.
[20] Word "require" substituted for word "request" by L. 1922, ch. 615.
[21] Word "instalments" substituted for word "instalment" by L. 1927, ch. 497.
[22] Sentence "No penalty . . . firemen" added by L. 1935, ch. 384, but not included by L. 1935, ch. 552.
[23] Paragraph "All awards . . . with this section" added by L. 1935, ch. 552.

Relative to liability of employer compare § 53; relative to lump sum awards, § 16, subd. 2, § 17, and notes below under this § 25; relative to advance payments, § 28; relative to payment of a disability award in case of the claimant's death, § 15, subd. 4, and § 33.

For provisions governing the payment of awards to non-residents of the United States, Canada or Newfoundland, see new § 25-b as enacted by L. 1941, ch. 492.

Section 33, declares that "Compensation and benefits shall be paid only to employees or their dependents"; § 15, subd. 4, and § 16, subd. 2, permit payment to guardians; §§ 11, 29, and 115 contain provisions relative to personal representatives, guardians, and committees; payment may be made to a committee: O'Rourke v. Standard Wood Turning Co., 204 App. Div. 658; 123 S. B. 53. Death benefits accrued and awarded but not yet paid to claimant at time of her own death vest in her estate: Miller v. Pierson & Williams, 253 N. Y. Rep. 541; 185 S. B. 164; death benefits accrued but not awarded do not: White v. Donner Steel Co., 259 N. Y. Rep. 574; 185 S. B. 165; Chrystal v. U. S. Trucking Co., 250 N. Y. Rep. 566; 161 S. B. 133; Barrett v. Burnett, 269 N. Y. Rep. 670; 185 S. B. 166.

Carriers' practice of sending compensation checks to employers for delivery to claimants is not in accord with the direct payment provision of this § 25 and § 33, following: Opinion of Attorney-General, December 19, 1935.

In the absence of any treaty provision on the subject between the United States and Mexico and direction from the dependents, check in payment of com-

muted award should be forwarded directly to dependents in Mexico entitled thereto rather than to consular officers: Opinion of Attorney-General, September 8, 1936.

The employer and carrier do not waive rights by failure to file the notice of controversy required by this section: Andress v. Art Metal Construction Co., 214 App. Div. 151; 140 S. B. 187.

Non-payment of awards—penalty. The ten per centum penalty imposed by this section applies to failure to pay an instalment of compensation within eighteen days after it is due, the twenty per cent penalty to failure to begin payment according to award within ten days and the $25 penalty to failure to give notice of stoppage of payments within sixteen days: Williams v. Roth, 245 App. Div. 874; 204 S. B. 392; 249 App. Div. 887; Opinion of Attorney-General, April 17, 1925; 140 S. B. 194. Re the twenty per cent penalty, time when the ten days begin to run, mandamus against state fund, etc., see Hart v. Industrial Comr., 258 N. Y. 61, 66; 185 S. B. 247; and re the twenty per centum penalty, amount upon commutation into aggregate trust fund, Brophy v. Prudential Insurance Co., 241 App. Div. 306; 185 S. B. 347. For case involving failure to pay award within ten days from date of withdrawal of appeal, see Corcoran v. American Woodworking Machinery Co., 260 App. Div. 965.

Claims for reimbursement. If an employer, having made payments to the injured employee during a disability period, claims reimbursement thereof before compensation for such period is paid, and if the injured employee has incurred no expense by providing and paying a substitute or helper during such period, the referee should award compensation to the injured employee for total disability or for partial disability, as the case may be, and should at the same time give the employer a lien against such compensation to the full amount of his payments: Ott v. Green-Wood Cemetery, 237 App. Div. 860; 262 N. Y. Rep. 532; 185 S. B. 237; the law is silent and the Department of Labor and the courts appear not to have clearly decided what the award should be when, with assent of his employer, a totally disabled employee, entitled to compensation under subd. 2 of § 15, provides and pays a substitute or substitutes to carry on his work while he continues to draw his wages: Zubradt v. Shepard Estate, 180 App. Div. 20; 95 S. B. 40; Rasmussen v. Park Garage & Machine Shop, 223 App. Div. 591; 156 S. B. 223; the award to a partially disabled employee who carries on by providing and paying a helper or helpers wages equal to or less than his own average weekly wages should be at the rate of two-thirds of the wages paid to the helper or helpers in accordance with subd. 5 of § 15. For impaired earnings award when helper works without pay, see Staniszewski v. Falls National Bank, 239 App. Div. 871; 185 S. B. 242; 242 App. Div. 745; 13 Ind. Bul. 255.

Decisions in cases of accidents occurring prior to the amendment of this section relative to credit for wage payments by L. 1930, ch. 316, indicate that wages paid during total disability are an offset against compensation under subds. 1 and 2 of § 15: Sullivan v. Seely Son, 226 App. Div. 629; affd., 252 N. Y. Rep. 621; 185 S. B. 237; Smith v. Surf Apartments, 227 App. Div. 832; reversed on notice, 253 N. Y. Rep. 542; Jones v. Republic L. H. & P. Co., 230 App. Div. 745; 185 S. B. 63; Beach v. Travelers Ins. Co., 263 N. Y. Rep. 676; 185 S. B. 240; compare Giamelli v. Rahtz, 209 App. Div. 720; 133 S. B. 224; Piasecki v. Cheramy, 214 App. Div. 831; 140 S. B. 188; Rasmussen v. Park Garage & Machine Shop, 223 App. Div. 592; 156 S. B. 223; Nagy v. Adwol Co., 234 App. Div. 903; 185 S. B. 232, 242; and statements of Industrial Board, 161 S. B. 170, 174; but indicated that wages earned during permanent partial disability while receiving schedule award payments under paragraphs "a" to "u," inclusive, of subd. 3 of § 15 do not diminish the compensation allotted by such paragraphs; compare Nybroe v. Mills Estate, 18 S. D. R. 637, 4 Bul. 104; 188 App. Div. 946; 95 S. B. 39; O'Esau v. Bliss Co., 14 S. D. R. 696, 3 Bul. 79; 95 S. B. 38. Wages received in an occupation or employment different from that in which the employee incurred his injury do not count: McKay v. Hinchman, 10 S. D. R. 636; 178 App. Div. 942; 97 S. B. 74. See 162 S. B. 127; 185 S. B. 235–242; Hayden v. American Laundry Machinery Co., 242 App. Div. 885; 13 Ind. Bul. 311.

Lump sum awards. Lump sum awards are strictly subordinated to the periodic payment plan by the phrase "in the interest of justice": Adams v. N. Y., Ontario & Western Ry. Co., 175 App. Div. 714; 220 N. Y. 579; 95 S. B. 164, 167; Sperduto v. N. Y. City Interborough Ry. Co., 186 App. Div. 145; 226 N. Y. 73; 95 S. B. 170, 177; Mandelblatt v. Auswaks, 207 App. Div. 73; 123 S. B. 49; Bell v. Fraser, 210 App. Div. 560; 133 S. B. 191; lump sum awards, however, are constitutional and are proper in particular cases: Sweeting v. American Knife Co., 226 N. Y. 199; 250 U. S. 596; 97 S. B. 13; Fawcett v. Lagenbecker Bros., 181 App. Div. 911; 223 N. Y. Rep. 680; 95 S. B. 188; Berman v. Reliance Metal S. & S. Co., 187 App. Div. 816; 97 S. B. 144; Dodd v. 461 Eighth Ave. Co., 188 App. Div. 941; 227 N. Y. Rep. 597; 98 S. B. 50; Coffey v. N. Y. Steam Co., Case No. 1922328; 198 App. Div. 961; 114 S. B. 96.

Lump sums are awardable to remarrying widows, § 16, subd. 2, and to aliens in foreign countries, § 17, above. For the Commission's policy relative to lump sum awards compare 1 Bul. No. 5, pp. 2, 3, No. 11, p. 17, No. 12, pp. 2, 3; 2 Bul. 50, 62; it may combine lump sum payment with periodic payments as in Fredenburg v. Empire U. Rys., 168 App. Div. 618; 170 App. Div. 942; 95 S. B. 188; it may reopen a case after awarding a lump sum and make further payments: Eggleston v. Shinola Co., 229 N. Y. Rep. 622; 114 S. B. 167; Metcalf v. Firth Carpet Co., 196 App. Div. 790; 114 S. B. 167; or it may rescind an unpaid lump sum award and substitute periodic payment: Spaduccino v. Hayes & Co., 180 App. Div. 37; 223 N. Y. Rep. 681; 95 S. B. 190. Amendment of § 22 by L. of 1928, ch. 754, permitting increase of a paid lump sum, offsets Goldstein v. Werebelovsky, 5 Ind. Bul. 21; 214 App. Div. 838; 149 S. B. 159, 275.

The court, with opinion, reversed a lump sum award and directed the Commission to resume periodic payments in Lauritzen v. Terry & Tench Co., 193 App. Div. 809; 114 S. B. 94.

The Industrial Board's refusal to approve a proposed settlement was commended in the case of a permanently and totally disabled claimant: Piazza v. Barbera & Labissi, Inc., 253 App. Div. 851; 204 S. B. 390.

An injured employee having died pending payment of an awarded lump sum, the courts held that it was payable under § 33 to his dependent adult sister: Bogold v. Bogold Bros., 35 S. D. R. 628; 218 App. Div. 676; 149 S. B. 172; 245 N. Y. Rep. 574; 156 S. B. 191; and to his dependent sister-in-law, Graham v. Bliss Co., 226 App. Div. 709; 185 S. B. 163.

Future installments of death benefits, except those of wives and children, are not commutable since there are no tables showing duration of dependency: Wagner v. Wilson & Co., 251 N. Y. 67; 161 S. B. 165; Bailey v. Columbia Rope Co., 184 App. Div. 718; 95 S. B. 169; 217 App. Div. 805; 156 S. B. 201; Russell v. 231 Lexington Ave. Corp., 236 App. Div. 177; 185 S. B. 243; but compare Stack v. Koppers Construction Co., 237 App. Div. 860; 185 S. B. 133, and Pacenza v. Booth & Flinn, 250 App. Div. 225; 204 S. B. 346, in which employers consented that dependency should be considered coextensive with life. For computation of present value of death benefits required to be paid into the Aggregate Trust Fund, see § 27, below.

For the general subject of payment, including lump sum payment, consult 162 S. B. 148–150, 162, 165; additional lump sum cases are Bechelli v. Recupero, 228 App. Div. 866; 9 Ind. Bul. 171; Nolan v. Treadwell Co., 228 App. Div. 870; 185 S. B. 246; Reid v. Arkansas Co., 233 App. Div. 451; 238 App. Div. 205; 185 S. B. 244, 245.

Commutation and payment from Aggregate Trust Fund to dependent parents. The Industrial Board has power to commute present value of dependent parents' benefits and direct payment thereof to them from the Aggregate Trust Fund into which it was paid by the carrier: Pocoroba v. May Co., 253 App. Div. 407; 204 S. B. 389.

§ 25-a. Procedure and payment of compensation in certain [1]claims; [2]limitation of right to compensation. [3]1. [4]Notwithstand-

ing other provisions of this chapter, when an application for compensation is made by an employee [5]or for death benefits in behalf of the [6]dependents of a deceased employee, [7]and the employer has secured the payment of compensation in accordance with section fifty of this chapter, (1) after a lapse of seven years from the date of the injury or death and claim for compensation previously has been disallowed or claim has been otherwise disposed of without an award of compensation, or (2) after a lapse of seven years from the date of [8]the injury or death and also a lapse of three years from the date of the last payment of compensation,[9] or (3) where death resulting from the injury shall occur after the time limited by the foregoing provisions of (1) or (2) shall have elapsed, [10]subject to the provisions of section one hundred and twenty-three of this chapter, testimony may be taken, either directly or through a referee [11]and if an award is made it shall be [12]against the special fund provided by this section. [13]Such an application for compensation or death benefits must be made on a form prescribed by the commissioner for that purpose and must, if a change in condition is claimed, be accompanied by a verified medical or surgical report setting forth facts on which the board may order a hearing. Any award which shall be made against such special fund after the effective date of this act upon such an application for compensation or death benefits shall not be retroactive for a period of disability or for death benefits longer than the two years immediately preceding the date of filing of such application.

[1] Word "claims" substituted for word "cases" by L. 1934, ch. 694.

[2] Words "limitation of right to compensation" inserted by L. 1940, ch. 686.

[3] Subdivision number supplied by L. 1940, ch. 686.

[4] Words "Notwithstanding other provisions of this chapter" inserted by L. 1934, ch. 694.

[5] Words "or for . . . deceased employee" inserted by L. 1934, ch. 694.

[6] Word "dependents" substituted for word "dependence" by L. 1940, ch. 686.

[7] Words "and the" substituted for word "whose" by L. 1934, ch. 694.

[8] Word "the" inserted by L. 1934, ch. 694.

[9] Words "provided, however, that where the case is disposed of by the payment of a lump sum the date of last payment for the purpose of this section shall be considered as the date to which the amount paid in the lump sum settlement would extend if the award had been made on the date the lump sum payment was approved at the maximum compensation rate the employee's earnings would warrant" inserted by L. 1935, ch. 482, stricken out by L. 1940, ch. 686; words "or (3) where . . . have elapsed" inserted by L. 1934, ch. 694.

[10] Words "subject to the provisions of section one hundred and twenty-three of this chapter" inserted by L. 1940, ch. 686.

[11] Word "and" inserted by L. 1934, ch. 694.

[12] Words "in favor of the claimant and" stricken out by L. 1934, ch. 694.

[13] Remainder of this subdivision added by L. 1940, ch. 686.

Former provisions relative to lump sum settlements, stricken from this subdivision by L. 1940, ch. 686, as indicated above, were reenacted as Subd. 7 of this section by said ch. 686.

[1]2. No such award shall be made unless [2]three members of the board shall have reviewed the claim and except by affirmative vote of at least [3]two of such [2]three members. Claims for further services

or treatment rendered or supplies furnished as required by section thirteen hereof shall be paid from such fund [4]when such service, treatment or supplies shall be [5]authorized by the commissioner. The provisions of this chapter with respect to procedure and the right to appeal shall be preserved to the claimant and to the employer originally liable for the payment of compensation[6] and to such fund through its representative as hereinafter provided.

[1] Subdivision number supplied by L. 1940, ch. 686.

[2] Word "three" substituted for word "four" by L. 1934, ch. 694.

[3] Word "two" substituted for word "three" by L. 1934, ch. 694.

[4] Word "when" inserted by L. 1934, ch. 694.

[5] Words "authorized by" substituted for words "under the supervision of" by L. 1934, ch. 694.

[6] Words "and . . . hereinafter provided" inserted by L. 1939, ch. 252.

[1]3. Any award so made shall be payable out of [2]the special fund [3]heretofore created for such purpose, [4]which fund is hereby continued and shall be known as the fund for reopened cases.[5] The employer, or, if insured, his insurance carrier shall pay into such fund for every case of injury causing death for which there are no persons entitled to compensation the sum of three hundred dollars [6]where such injury occurred prior to July first, nineteen hundred forty and, except in cases arising under article four-a of this chapter, the sum of one thousand dollars where such injury shall occur on or after said date, and in each case of death resulting from injury sustained on or after said date where there are persons entitled to compensation but the total amount of such compensation is less than two thousand dollars exclusive of funeral benefits, the employer, or, if insured, his insurance carrier, shall pay into such fund the difference between the sum of two thousand dollars and the compensation, exclusive of funeral benefits, actually paid to or for the dependents of the deceased employee together with any expense charge required by section twenty-seven of this chapter; [7]provided, however, that where death shall occur subsequent to the periods limited by [8]subdivision one of this section no payment into such special fund nor to the special funds provided by subdivisions eight and nine of section fifteen of this chapter shall be required. [9]In addition to the assessments made against all insurance carriers for the fiscal year ending June thirtieth, nineteen hundred forty, for the expenses of administering the workmen's compensation law provided for under the provisions of section one hundred and twenty-six of this chapter, the industrial commissioner shall, as soon as practicable, asses and collect from such insurance carriers an amount totaling one hundred thousand dollars in the manner set forth in said section and in the same proportion as was assessed for the fiscal year ending June thirtieth, nineteen hundred forty, which amount when collected shall be deposited with the commissioner of taxation and finance for the benefit of the special fund created under this section.

[10]In addition to the assessment and the payments above provided, the employer, or, if insured, his insurance carrier, shall pay the sum of five dollars into said fund for each case in which an award is made pursuant to the provisions of paragraphs a to s inclusive of subdivision three of section fifteen of this chapter, by reason of injury sustained between July first, nineteen hundred forty and June thirtieth, nineteen hundred forty-seven, both dates inclusive, which payment shall be in addition to any payment of compensation to the injured employee as provided in this chapter.

[11]Such assessment [12]and the payments made into said fund shall constitute an element of loss for the purpose of establishing rates for workmen's compensation insurance as provided in the insurance law.

[1] Subdivision number supplied by L. 1940, ch. 686.

[2] Word "the" substituted for word "a" by L. 1940, ch. 686.

[3] Word "heretofore" inserted by L. 1940, ch. 686.

[4] Words "in the following manner: The commissioner of taxation and finance is hereby authorized and directed to transfer from the vocational rehabilitation fund created by subdivision nine of section fifteen of this chapter the sum of two hundred thousand dollars par value in any securities now held by him as custodian and fifty thousand dollars in cash, which shall be deposited in the special fund created herein, which" stricken out and words "which fund is hereby continued and" inserted by L. 1940, ch. 686.

[5] Sentence "The commissioner of taxation and finance is herewith authorized to cause such securities to be changed in registration in keeping with the requirements of this act" stricken out by L. 1940, ch. 686.

[6] Words "where such injury . . . charge required by section twenty-seven of this chapter" inserted by L. 1940, ch. 686.

[7] Words "except that . . . shall be required" inserted by L. 1934, ch. 694; words "provided, however" substituted for word "except" by L. 1940, ch. 686.

[8] Words "subdivision one of" inserted by L. 1940, ch. 686.

[9] Following sentence added by L. 1941, ch. 376. Provision relative to assessments for fiscal years 1938 and 1939, inserted by L. 1939, ch. 252 and L. 1940, ch. 686, stricken out by L. 1941, ch. 376.

[10] Following paragraph inserted by L. 1940, ch. 686.

[11] Concluding sentence added by L. 1939, ch. 252.

[12] Words "and the payments made into said fund" inserted by L. 1940, ch. 686.

[1]4. The commissioner of taxation and finance shall be the custodian of such special fund for reopened cases and shall invest any surplus moneys thereof in securities which constitute legal investments for savings banks under the laws of this state and may sell any of the securities in which such fund is invested, if necessary for the proper administration or in the best interest of such fund. Disbursements from such fund for compensation provided by this section shall be paid by the commissioner of taxation and finance upon vouchers signed by the industrial commissioner or the deputy industrial commissioner.

[2]The commissioner of taxation and finance, as custodian of such fund, annually as soon as practicable after July first, shall furnish to the industrial commissioner a statement of the fund, setting forth the balance of moneys in the said fund as of the beginning of the year, the income of the fund, specifying the sources of all

income, the payments out of the fund on account of compensation ordered to be paid by the board, medical and other expense, and all other charges against the fund, and setting forth the balance of the fund remaining to its credit on June thirtieth. Such statement shall be open to public inspection in the office of the industrial commissioner, and a copy thereof shall be transmitted by the industrial commissioner to the superintendent of insurance. The superintendent of insurance, either personally or by any duly authorized examiner appointed by him for that purpose, shall in nineteen hundred forty and biennially thereafter examine into the condition of such fund within thirty days after receipt by him of a copy of the statement of account of the fund. He shall verify the receipts and disbursements of the fund, and shall ascertain the liability of the fund upon all cases in which awards of compensation have been made and charged against said fund and shall render a report of such facts to the industrial commissioner. Such report shall also be open to public inspection in the office of the industrial commissioner.

[1] Subdivision number supplied by L. 1940, ch. 686.
[2] Remainder of this subdivision added by L. 1940, ch. 686.

[1]5. When an application for compensation is made under this section, the chairman of the industrial board shall appoint a representative of such fund in such proceedings and, insofar as practicable, such representative shall be a person designated by the employer originally liable for the payment of compensation, or his insurance carrier, [2]but whenever it shall appear to the industrial board that through any committee, board or organization or representative of the interest of the insurance carriers an attorney has been appointed to act for and on behalf of such carriers generally to represent such fund in any proceedings brought hereunder, the chairman of the board shall designate such attorney as the representative of the fund in proceedings brought to enforce a claim against such fund. [3]Such representative may apply to the industrial commissioner for authority to hire such medical or other experts and to defray the expense thereof and of such witnesses as are necessary to a proper defense of the application [4]within an amount in the discretion of the industrial commissioner and, if authorized, it shall be a charge against the special fund provided herein.

[1] Subdivision number supplied by L. 1940, ch. 686.
[2] Words "but whenever . . . to enforce a claim against such fund" inserted by L. 1939, ch. 252.
[3] Concluding sentence added by L. 1934, ch. 694.
[4] Words "within an amount in the discretion of the industrial commissioner" substituted for words "not in excess of one hundred dollars" by L. 1939, ch. 252.

[1]6. Notwithstanding any other provision of this chapter, no award of compensation or death benefits shall be made against said special fund or against an employer or an insurance carrier where

application therefor is made after a lapse of eighteen years from the date of the injury or death and also a lapse of eight years from the date of the last payment of compensation.

[1] Subdivision 6 inserted by L. 1940, ch. 686.

[1]7. For the purposes of this section the date of the last payment of compensation shall be deemed to mean the date of actual payment of the last installment of compensation previously awarded; provided, however, that where the case is disposed of by the payment of a lump sum, the date of last payment for the purpose of this section shall be considered as the date to which the amount paid in the lump sum settlement would extend if the award had been made on the date the lump sum payment was approved at the maximum compensation rate which is warranted by the employee's earning capacity as determined by the board under section fifteen of this chapter.

[1] Subdivision 7 inserted by L. 1940, ch. 686.

[1]8. The provisions of this section shall not apply [2]to any open case pending before the industrial board on April twenty-fourth, nineteen hundred thirty-three or to any closed case in which an application for reopening was received prior to such date, or to awards for deficiency compensation made pursuant to section twenty-nine of this chapter, nor shall it apply during the pendency [3]of an appeal provided for by section twenty-three of this chapter; provided, however, that such provisions shall be retroactive in effect except as to payments into the special fund provided for an employer or his insurance carrier, [4]and except as otherwise herein provided.

[1] Subdivision number supplied by L. 1940, ch. 686.

[2] Words "to any open . . date, or" inserted by L. 1933, ch. 774.

[3] Word "or" substituted for word "of" by L. 1933, ch. 774; word "of" restored by L. 1934, ch. 694.

[4] Words "and except as otherwise herein provided" inserted by L. 1940, ch. 686.

Cases open and pending before the Industrial Board on April 24, 1933—application of section. The special fund of § 25-a was held liable for compensation in a case which had been open and pending before the Industrial Board on April 24, 1933, where said case, in December of 1933, was closed with an award and subsequently reopened after the time limitations provided by § 25-a had accrued. Riddle v. General Ice Cream Corp., 262 App. Div. 353, July 2, 1941.

Cases pending in the courts—application of section. Statement in this § 25-a that its provisions shall not apply during the pendency of an appeal provided for by § 23 of the law held to be only a requirement that such appeal time be eliminated in making up the seven and three year limitations otherwise provided in such section. Riddle v. General Ice Cream Corp., 262 App. Div. 353, July 2, 1941.

General Notes on § 25-a

[*Section 25-a added by L.* 1933, *ch.* 384; *am'd by L.* 1933, *ch.* 774; *L.* 1934, *ch.* 694; *L.* 1935, *ch.* 482; *L.* 1939, *ch.* 252; *L.* 1940, *ch.* 686; *L.* 1941, *ch.* 376.]

established by subds. 8 and 9 of § 15 above; see notes relative to constitutionality, etc., under subd. 8.

Older special funds similar in source and custody to the fund of this § 25-a are

LIABILITY OF SPECIAL FUND

The cases appearing below were decided prior to the enactment of Chapter 686, Laws of 1940. Such Chapter amended § 123 of the Law to provide that where an employer has secured the payment of compensation, no claim for compensation or for death benefits (1) that has been disallowed after a trial on the merits, or (2) that has been otherwise disposed of without an award after the parties in interest have been given due notice of hearing and opportunity to be heard and for which no determination was made on the merits, shall be reopened after a lapse of seven years from the date of the accident or death. The chapter further provided that no award of compensation or death benefits shall be made against the special fund of § 25-a where application therefor is made after a lapse of eighteen years from the date of the injury or death and also a lapse of eight years from the date of the last payment of compensation. The changes effected in § § 25-a and 123 by this Chapter 686 are indicated by numbered notes appended to each section.

Application for reopening—what constitutes. If a case falling within the scope of this § 25-a is reopened subsequent to April 24, 1933, award must be made against its special fund no matter how or by whom the reopening is made: Ryan v. American Bridge Co., 243 App. Div. 496; 268 N. Y. Rep. 502; 185 S. B. 104; Cordial v. Townsend Furnace & Machine Co., 243 App. Div. 829; 14 Ind. Bul. 83; see also Sehm v. Sibley, Lindsay & Curr Co., 242 App. Div. 271; 185 S. B. 106.

Press man suffered an eye injury in July, 1921, for which he received compensation for ensuing temporary disability. In December, 1921, his case was closed on the compensation paid. In March, 1922, by letter, he requested reopening of his case and was notified to submit a medical report showing the extent of his injuries. In October, 1938, about sixteen and one-half years later, claimant submitted another application for reopening accompanied by the report of a physician. Decision of Industrial Board that further compensation may not be charged against the Special Fund of section 25-a inasmuch as the application of March, 1922, was filed within seven years from date of the accident and was still pending on April 24, 1933, reversed with statement that the long lapse of time is conclusive evidence that the original application was abandoned: Kane v. Utica Knitting Co., 259 App. Div. 947; 204 S. B. 394.

Laborer suffered an eye injury in February, 1932, and received compensation for the ensuing disability. In September, 1932, the case was closed on compensation paid. In May, 1933, by letter, he applied for further compensation and was instructed to submit a medical report showing the extent of his injuries. In July, 1939, more than seven years after date of the accident claimant submitted the medical report. Decision of Industrial Board that the self-insured employer was liable for any further compensation inasmuch as the application of May, 1933, was filed within seven years from date of the accident and within three years from the date of the last payment of compensation was affirmed: Marinaccio v. City of New York, 259 App. Div. 947; 204 S. B. 395.

For additional cases, see 204 S. B. 393–397.

Chapter 482, Laws of 1935, retroactivity. Amendment of § 25-a by ch. 482, Laws of 1935, to regulate its application to cases in which lump sum awards have been made, was held not to be retroactive: Tipton v. Lang's Bakery, 250 App. Div. 696; 275 N. Y. Rep. 572; 204 S. B. 398. See also Hester v. Antoniette, 252 App. Div. 823; 204 S. B. 401.

Claim saved by "advance payment". Where claim for disability filed twelve years after the injury was saved by an advance payment of compensation, said claim was held compensable out of the special fund of this section: Gabriel v. Brooklyn-Manhattan Transit Corp., 254 App. Div. 789; 204 S. B. 401.

Disability and death claims separate and distinct. Pin boy in bowling alley sustained injuries in 1925 which cost his life in 1927. In 1932 the Industrial Board disallowed claim of his dependent mother for benefits because of her failure to give timely notice of death. In 1935 the Board awarded to the mother the disability compensation accrued at time of her son's death. In 1938 the Board, reopening the death case, excused the failure to give statutory

notice. Subsequent award of death benefits to the mother was held payable out of the Special Fund of section 25-a since the disability claim and the death claim were separate and distinct and the death claim met the requirements of section 25-a: De Santis v. Folcaro, 259 App. Div. 768; 204 S. B. 402.

Medical expenses. Medical expenses are part of compensation and chargeable against the fund of § 25-a in a proper case. Wyski v. Brewer Dry Dock Co., 251 App. Div. 769; 204 S. B. 403.

To be chargeable against the special fund of this § 25-a, medical care and treatment must be given after authorization or conditional authorization thereof by the commissioner: Opinions of Attorney-General, May 28 and July 15, 1935.

Open and pending claim defined. In 1926, the presiding referee closed a 1924 case, without prejudice, and with instruction to claimant that after he had obtained an operation he could apply for further award. Following an operation in 1934, the Industrial Board awarded compensation to claimant against the carrier, ruling that the case was open and pending on April 24, 1933. Award was reversed and the matter remitted for award under § 25-a: Greenberg v. Fox, 272 N. Y. Rep. 549; 204 S. B. 406.

For additional cases, see 204 S. B. 405–413.

Payment of medical bill as payment of compensation. Where the carrier within "three year lapse period" furnished claimant with a truss, additional compensation was held not payable out of the special fund of § 25-a, the court ruling that this was a payment of compensation: Patti v. Knickerbocker Fireproofing Co., 255 App. Div. 732; 280 N. Y. Rep. 609; 204 S. B. 414; Nylander v. Hilt Co., Inc., 259 App. Div. 766; 204 S. B. 414.

Provision that § 25-a shall not apply during pendency of appeal—construed. Where an award against the carrier was reversed and the matter remitted for an award against the special fund of § 25-a, compensation covering period of the appeal was held chargeable against the special fund: Vleck v. Parry, 245 App. Div. 416; 270 N. Y. 371; 204 S. B. 415. See also Riddle v. General Ice Cream Corp., 262 App. Div. 353, July 2, 1941.

Reimbursement out of the special fund. Reimbursement out of the special fund of § 25-a was ordered where an award payable by the fund was paid by a carrier erroneously charged therewith: Sutari v. City of New York, 254 App. Div. 923; 204 S. B. 417.

REVIEW BY FULL MEMBERSHIP OF INDUSTRIAL BOARD

The Special Fund's contention that the Industrial Board had committed error in ruling that the full Board was without authority to review Special Fund cases figured in Stapholtz v. Rothman Co., 260 App. Div. 818.

§ 25-b. **Awards to non-residents: Non-resident compensation fund.** 1. There is hereby created a fund to be known as the non-resident compensation fund. Whenever an award is made to or on behalf of alien dependents, non-residents of the United States, Canada or Newfoundland, or an award is made to a non-resident citizen of the United States, which calls for the payment of compensation or death benefits, or where there is outstanding an unpaid balance of compensation or death benefits payable to such non-resident, and it shall appear that the person or persons to whom the award has been made or any balance of such award is payable, would not have the full benefit or use or control of the money payable under such award, or where other special circumstances made it desirable that present payment of the award shall be withheld, the employer, or if insured, his insurance carrier, or any special fund liable for such payment, may, by order of the board, be required to pay to the comptroller of the

state of New York all amounts then due or thereafter to become due under the terms of the award to such non-resident. The moneys so paid in shall be held by the comptroller in the non-residents compensation fund.

2. All computations for the commutation of any such award for payment into the said fund shall be made in accordance with the tables specified in section twenty-seven of this chapter.

3. The payment of the amount of any such award into the non-resident compensation fund shall constitute a complete discharge of the employer or insurance carrier from all liability for such award.

4. If at any time there shall be created by any act of the congress of the United States or by any lawful rule or regulation of the president any agency or fund for the safekeeping or custody of moneys belonging to or payable to any non-resident alien, and if such act or rule shall require the payment into such agency or fund of any moneys theretofore paid into the fund for foreign dependents, the board may make its findings and issue its order thereon directing the transfer of such moneys by the comptroller to such other agency or fund.

5. Any moneys so paid into such fund shall be held by the comptroller until the further order of the board. Whenever the board shall find that the reasons and conditions which made it desirable that payment into the fund be made have changed and that the cause for such withholding shall no longer exist, the board may make findings and issue its order thereon directing the payment without interest of the whole or any part thereof then due by the comptroller to the person or persons for whose benefit the award was made.

6. If the board, at any time, upon evidence presented to it, shall find that all or any part of the funds so deposited in such fund are not due and payable to the non-resident for whose benefit they were deposited, it shall direct the repayment of such amount so deposited, without interest, by the comptroller to the party required to make the deposit as aforesaid.

7. If no evidence shall be presented to the board of the present existence of any such non-resident within eight years from the date when the board has found that the precedent conditions set forth in paragraph one hereof have changed and that direct payments could be made to such person or persons if such person or persons are alive, it shall be presumed in the absence of substantial evidence to the contrary, that such person or persons are non-existent and the board shall thereupon order the payment without interest of the amount deposited for the benefit of such person or persons to the party required to make such deposit as aforesaid, provided however, that thereafter such employer, carrier or fund receiving such repayment shall continue to be liable for any compensation subsequently found by the board to be due, notwithstanding any other provisions of this chapter. [*This* § 25-*b added by L.* 1941, *ch.* 492.]

For other provisions governing the commutation of compensation awarded to aliens in foreign countries, see § 17, above, and notes thereunder.

§ 26. **Enforcement of payment in default.** [1]In case of default by the employer in the payment of any compensation due under an award for the period of thirty days after payment is due and payable, or, where the employer has failed to secure the payment of compensation to his employees as required by section fifty hereof where there is such default in payment for a period of ten days after same is due, any party in interest may file with the county clerk for the county in which the injury occurred [2]or the county in which the employer has his principal place of business, a certified copy of [3]the decision of the state industrial [4]board awarding compensation or ending, diminishing or increasing compensation previously awarded, from which no appeal has been taken within the time allowed therefor, or if an appeal has been taken by an employer who has not complied with the provisions of section fifty hereof, where he fails to deposit with the [5]commissioner the amount of the award as security for its payment within ten days after same is due and payable, and thereupon judgment must be entered in the supreme court by the clerk of such county in conformity therewith immediately upon the filing of such decision. [6]If the payment in default be an instalment, the commissioner may declare the entire award due and judgment may be entered in accordance with the provisions of this section. Such judgment shall be entered in the same manner, have the same effect and be subject to the same proceedings as though rendered in a suit duly heard and determined by the supreme court, except that no appeal may be taken therefrom. The court shall vacate or modify such judgment to conform to any later award or decision of the board upon presentation of a certified copy of such award or decision. The award may be so compromised by the board as in the discretion of the board may best serve the interest of the persons entitled to receive the compensation or benefits. Neither the commissioner nor any party in interest shall be required to pay any fee to any public officer for filing or recording any paper or instrument [7]or for issuing a transcript of any judgment executed in pursuance of this section. [*As am'd by L.* 1915, *ch.* 167; *L.* 1916, *ch.* 622; *L.* 1921, *ch.* 539; *L.* 1922, *ch.* 615; *and L.* 1926, *ch.* 256.]

[1] Provision for actions by commission against employers failing to pay compensation, with penalties, stricken out and section partly redrafted by L. 1922, ch. 615.

[2] Words "or the county in which the employer has his principal place of business" inserted by L. 1922, ch. 615.

[3] Word "the" substituted for word "a" by L. 1926, ch. 256.

[4] Word "board" substituted for word "commission" by L. 1922, ch. 615.

[5] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.

[6] Remainder of section, except final sentence, redrafted from former provisions of the section by L. 1922, ch. 615.

[7] Words "or for issuing a transcript of any judgment" inserted by L. 1926, ch. 256.

Compare new § § 54-a and 54-b, below.

For other provisions relative to compromise compare §§ 29 and 33, below.

Sections 109-c and 109-g below exempt from the provision of this § 26 defaults by insolvent carriers subsequent to March 27, 1935.

Upon award by the Department, claims for medical treatment or care under subd. (b) of § 13 are collectible under this section: Semmen v. Butterick Publishing Co., 101 Misc. 285; 95 S. B. 24; Goldflam v. Kazemier & Uhl, 181 App. Div. 140; 95 S. B. 27.

For primary preference of a judgment under this § 26 against real estate see § 510 of the Civil Practice Act and interpretation thereof in Guarneri Estate, 149 Misc. 759; 185 S. B. 341.

The Appellate Division affirmed a compromise under this § 26 which released one of two partners and held that the liability of the other partner should continue: Rahman v. Bethel, 236 App. Div. 182; 185 S. B. 339.

The Industrial Board may approve a compromise between employer and claimant without relieving the carrier's liquidator from liability for at least the unpaid balance: Opinion of the Attorney-General, June 14, 1934. See also Opinion of Attorney-General, November 8, 1937.

For disposition of monies collected by the Department of Labor and not claimed by injured employees or their beneficiaries, see Opinion of Attorney-General, September 21, 1933.

In an opinion dated April 22, 1932, the Attorney-General held that a claimant might subpoena the employer under this § 26 for examination concerning his property in accordance with § 773-a (now § 775) of Article 45 of the Civil Practice Act as added by L. 1932, ch. 452; but in an opinion dated July 13, 1934, held that a claimant might not have body execution in accordance with § 826 of the Civil Practice Act. Chapter 630 of the Laws of 1935 has repealed Article 45 and replaced it with a new article of which § 775 and other sections deal with subpoena and other proceedings against judgment debtors.

Collections of unpaid awards and prosecutions for uninsurance are reviewed by counsel in the Department's Annual Reports.

§ 27. **Depositing future payments** [1]**in the aggregate trust fund.** [2]All payments made into the fund pursuant to the provisions of this section shall constitute an indivisible and aggregate trust fund except as hereinafter provided. If an award under this chapter requires payment of death benefits or other compensation by an insurance carrier or employer in periodical payments, the [3]board may, in its discretion, at any time, any provision of this chapter to the contrary notwithstanding, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid death benefits or other compensation in cases in which awards are made for total permanent or permanent partial disability for a period of one hundred and four weeks or more, for which liability exists, together with such additional sum as the [3]board may deem necessary for a proportionate payment of expenses of administering the fund so created. [4]If any such award made on or after July first, nineteen hundred thirty-five, requires payment for total permanent disability resulting from the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, or for permanent partial disability resulting from loss of an arm, leg, hand, foot or eye, or of death benefits by an insurance carrier which is a stock corporation or mutual association, the board shall immediately compute the present value

thereof and require payment of such amount into the [5]aggregate trust fund, together with such additional sum as the board may deem necessary for a proportionate payment of expenses of administering [6]such trust fund, [7]provided, however, that where an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, the computation of the present value and the requirement for payment of such amount into the said trust fund shall be held in abeyance until (1) six months have elapsed from the award of compensation, or in any event not more than one year after the date of the accident, if the injured employee, or in case of death, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise, on account of such injury or death, have failed to commence such action, (2) the termination of any such action brought by the injured employee, or in case of death, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise, on account of such injury or death, under the provisions of section twenty-nine of this chapter.[8] [9]Upon payment by an employer or insurance carrier into [10]the aggregate trust fund of an amount equal to the present value of all unpaid death benefits or other compensation under any such award,[11] such employer or insurance carrier shall be discharged from any further liability[12] for payment of such death benefits or other compensation, and payment of the same as provided by this chapter shall be assumed by the [13]fund so created. [14]In the event of a review or appeal of any such award the value of which has not been paid into the aggregate trust fund, if the amount of award is modified or changed, the employer or insurance carrier shall pay directly to the claimant compensation due to the date as of which the present value of future benefits is payable into such fund, and to the said fund the present value of future benefits, but if the original award is affirmed, the employer or insurance carrier shall pay to such fund the present value of the award computed as of the effective date of the original award and simple interest on such amount at three per centum per annum computed from the date of the original award to the date that payment is made into such fund, plus simple interest at six per centum per annum on past due payments of compensation to the date of the affirmance of such award, which past due payment and interest shall be made directly to the claimant. The foregoing provision shall apply in the event of such review or appeal regardless of whether the widow or other parties in interest have died or the widow or dependent husband remarried subsequent to the date as of which the present value of the original award was computed. [15]If any[16] award, [17]the present value of which has been paid into the aggregate trust fund, is subsequently modified or changed by the board for any reason other than because of subsequent death or remarriage, the amount equal to the present value of the unpaid death benefits or other compensation at

the effective date of such modification or change shall be computed on the basis both of the original award and of the modified or changed award. If such amount is greater on the basis of the original award, the difference shall be paid by [18]said trust fund to [19]the employer or insurance carrier. If such amount is greater on the basis of the modified or changed award, the difference shall be paid to [18]said trust fund by such employer or insurance carrier. [20]In the case of an accident occurring on or subsequent to July first, nineteen hundred thirty-nine, where the present value of an award for permanent total or permanent partial disability other than award for a definite number of weeks has been paid into the aggregate trust fund, if an award is made for death resulting from the injury causing the said disability, the employer or insurance carrier which paid the present value of said disability award into such fund shall be entitled to the difference between the amount paid into such fund and the sum disbursed from such fund to the injured employee prior to his death, plus simple interest on such difference at three per centum per annum. In the case of an accident occurring on or subsequent to July first, nineteen hundred thirty-nine, where the present value of an award for permanent partial disability for a definite number of weeks has been paid into the aggregate trust fund, if the injured employee dies prior to the end of such definite number of weeks, the employer or insurance carrier which made the said payment into such fund shall be entitled to the present value of the unexpended disability benefits not payable to beneficiaries computed on the basis of annuities certain with interest at the rate of three per centum per annum. All computations made by the board shall be upon the basis of the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and interest at three and one-half per centum per annum [21]on claims based on accidents occurring up to and including June thirtieth, nineteen hundred thirty-nine and at three per centum per annum on claims based on accidents occurring thereafter, [22]except [23](a) that computations of present values of death benefits required to be paid into the [24]aggregate trust fund by [25]an insurance carrier which is a stock corporation or a mutual association shall be based, in the case of a dependent parent, grandparent, blind or crippled child or husband, upon said table of mortality disregarding possible change in or termination of dependency, with interest at three and one-half per centum per annum [26]on claims based on accidents occurring up to and including June thirtieth, nineteen hundred thirty-nine and at three per centum per annum on claims based on accidents occurring thereafter and (b) that computations of present values of permanent partial disability benefits awarded for a definite number of weeks shall be on the basis of annuities certain with interest at three and one-half per centum per annum on claims based on accidents occurring up to and including June thirtieth, nineteen hundred thirty-nine and at three per centum per annum on claims based on accidents occurring thereafter.

Such [27]aggregate trust fund shall be kept separate and apart from all other moneys of the state fund, and shall not be liable for any losses or expenses of administration of the state fund other than the expenses involved in the administration of such [28]trust fund, nor shall the state fund be charged with the losses or expenses of the aggregate [28]trust fund beyond the amount of such [28]trust fund.[29]

Any portion of such [27]aggregate trust fund may [30]be invested [31]by the [32]commissioners, with the approval of the superintendent of insurance, in [33]the same securities as provided in this chapter for the investment of the state insurance fund.

[34]For the purpose of securing the solvency of the aggregate trust fund, there shall be required, in addition to the payments hereinbefore provided for, a payment on each claim based on an accident occurring on or subsequent to July first, nineteen hundred forty-one, which shall be in an amount equal to six per centum of the present value of each such case paid into such fund. Such additional payments shall be required until the surplus of the fund equals or exceeds one per centum of the total outstanding loss reserves as of December thirty-first next preceding as shown by the annual report of the fund to the superintendent of insurance; provided, however, that no such additional six per centum payment shall be required upon any claim based upon an accident occuring on or subsequent to July first next succeeding the said December thirty-first. [*As am'd by L.* 1916, *ch.* 622; *L.* 1917, *ch.* 705; *L.* 1922, *ch.* 615; *L.* 1935, *ch.* 255; *L.* 1938, *ch.* 585; *L.* 1939, *chs.* 512, 937; *L.* 1941, *ch.* 325.]

[1] Words "in the aggregate trust fund" added by L. 1939, ch. 937.

[2] Following sentence added by L. 1939, ch. 937.

[3] Word "board" substituted for word "commission" by L. 1922, ch. 615.

[4] Words "If any . . . a proportionate payment of expenses of administering the fund as created" inserted by L. 1935, ch. 255; in this clause, words "such trust fund" substituted for words "the fund as created" by L. 1939, ch. 937.

[5] Words "aggregate trust" substituted for word "said" by L. 1939, ch. 937.

[6] Words "such trust" substituted for the word "the" by L. 1939, ch. 937.

[7] Words "as created" stricken out and remainder of sentence inserted by L. 1939, ch. 937.

[8] Sentence "The moneys so paid in for all death benefits or other compensation shall constitute one aggregate and indivisible fund" stricken out by L. 1939, ch. 937; in this sentence, word "shall" had been substituted for word "to" by L. 1935, ch. 255.

[9] Words "Upon payment . . . any such award" inserted by L. 1935, ch. 255.

[10] Words "the aggregate trust" substituted for word "such" by L. 1939, ch. 937.

[11] Words "and thereupon" eliminated by L. 1939, ch. 937.

[12] Words "for payment . . . other compensation" inserted by L. 1935, ch. 255.

[13] Word "special" stricken out by L. 1939, ch. 937.

[14] Following two sentences "In the event . . . award was computed" inserted by L. 1939, ch. 937.

[15] Three sentences "If any . . by such employer or insurance carrier" inserted by L. 1935, ch. 255.

[16] Word "such" stricken out by L. 1939, ch. 937.

[17] Words "the present value of which has been paid into the aggregate trust fund" inserted by L. 1939, ch. 937.

[18] Words "said trust" substituted for words "the state" by L. 1939, ch. 937.
[19] Word "the" substituted for word "such" by L. 1939, ch. 937.
[20] Following two sentences "In the case . . . per annum" inserted by L. 1939, ch. 937.
[21] Words "on claims . . . thereafter" inserted by L. 1939, ch. 937.
[22] Words "except that computations . . . of dependency, with interest at three and one-half per cent per annum" inserted by L. 1935, ch. 255.
[23] Letter "(a)" inserted by L. 1939, ch. 937.
[24] Words "aggregate trust" substituted for words "state insurance" by L. 1939, ch. 937.
[25] Words "an insurance carrier which is" inserted by L. 1939, ch. 937.
[26] Remainder of this paragraph inserted by L. 1939, ch. 937.
[27] Words "aggregate trust" substituted for word "special" by L. 1939, ch. 937.
[28] Word "trust" substituted for word "special" by L. 1939, ch. 937.
[29] Paragraph "The commission may in like manner, in its discretion, commute and permit or require to be paid, into said aggregate special fund, by one or more resolutions one or more awards computable under this section" stricken out by L. 1922, ch. 615.
[30] Words "pursuant to a resolution of the commission approved by the superintendent of insurance" stricken out by L. 1922, ch. 615.
[31] Words "by the commissioner, with the approval of the superintendent of insurance," inserted by L. 1922, ch. 615.
[32] Word "commissioners" substituted for word "commissioner" by L. 1938, ch. 585.
[33] Words "the same securities as provided in this chapter for the investment of the state insurance fund" substituted for words "any of the securities in which a life insurance corporation may invest its assets as provided in section one hundred of the insurance law" by L. 1922, ch. 615.
[34] Concluding paragraph added by L. 1941, ch. 325.

L. 1939, ch. 512, amending this section, was repealed by L. 1939, ch. 937, which reenacted its provisions. Sections 4, 5 and 6 of Chapter 937, Laws of 1939, read as follows:

"§ 4. There is hereby appropriated, out of any moneys in the treasury not otherwise appropriated, the sum of five thousand dollars ($5,000) or so much thereof as may be necessary to be paid on vouchers approved by the industrial commissioner, for the purpose of recomputation of the tables for the computation of awards to be paid into the aggregate trust fund in accordance with section twenty-seven of the workmen's compensation law, as amended, which sum, or so much thereof as may be expended for such purpose, shall be deemed a part of the administrative expense of the department of labor in administering the workmen's compensation law and shall be assessed against and collected from all insurance carriers in accordance with the provisions of section one hundred twenty-six of the workmen's compensation law.

"§ 5. Chapter five hundred twelve of the laws of nineteen hundred thirty-nine, entitled "An act to amend the workmen's compensation law, in relation to depositing future payments of awards of death benefits and other compensation and requiring contributions thereto," is hereby repealed.

"§ 6. All acts and proceedings heretofore done or taken and all expenditures heretofore made under or pursuant to the provisions of the chapter repealed by this act are hereby legalized, validated, ratified and confirmed and all such expenditures shall be deemed to have been made from the appropriation made by this act and the amount of such expenditures shall be deducted from the amount of such appropriation."

Award for industrial blindness. An employee suffered accidental injuries resulting in industrial blindness in both eyes. The Industrial Board commuted his award for permanent total disability and directed its payment into the Aggregate Trust Fund notwithstanding the carrier's contention that the law

required the loss of a member and not merely the loss of use of a member as the basis of such commutation. The Board's decision was affirmed. Shaw v. Danforth, 258 App. Div. 1028; 204 S. B. 420.

Deficiency compensation. The Industrial Board's authority to commute value of award for deficiency compensation due in the future and order its immediate payment into the Aggregate Trust Fund provided allowance is made for interest in computation was upheld: Voelker v. Rosenberg's Sons, 251 App. Div. 50; 275 N. Y. Rep. 565; 204 S. B. 422.

Double compensation—illegal employment of minors. An employer liable for second award of death benefits due to illegal employment of a minor was not required to deposit present value thereof into the Aggregate Trust Fund: Stachowiak v. O'Rourke Baking Co., 255 App. Div. 734; 280 N. Y. 338; 204 S. B. 423.

Incompetent claimants—life expectancy. The State Industrial Board directed payment into the Aggregate Trust Fund of a lump sum for the benefit of a dependent incompetent mother. The carrier contended that the Board should have considered the physical and mental condition of the claimant in determining her life expectancy. Contention overruled. Gilchrist v. American News Co., 248 App. Div. 923; 204 S. B. 422.

Question whether or not a special life expectation appertained to dementia praecox figured in Pettinelli v. Degnon Contracting Co., 218 App. Div. 7; 149 S. B. 206.

Mandatory commutation—retroactivity. Mandatory commutation under this section was held proper even though accident occurred prior to the enactment of Chapter 255, Laws of 1935: Goerl v. Darmstadt, Inc., 257 App. Div. 872; 204 S. B. 425. See also Crowley v. Arrowhead Mills, Inc., 252 App. Div. 299; 204 S. B. 420.

Payment of present value of benefits to parents from Aggregate Trust Fund. The Industrial Board may commute the present value of dependent parents' benefits and direct payment thereof to them from the Aggregate Trust Fund: Pocoroba v. May Co., 253 App. Div. 407; 204 S. B. 425.

Refund from Aggregate Trust Fund. The Industrial Board directed a refund from the Aggregate Trust Fund, without interest. Decision was affirmed, with statement, "Interest is payable as damages for the improper withholding of funds by a governmental agency only when provided for by statute. There is no statute permitting payment in this case." Brophy v. Prudential Ins. Co., 246 App. Div. 871; 271 N. Y. Rep. 644; 204 S. B. 424.

If money is paid into the Aggregate Trust Fund by mistake, as when a child beneficiary has died without the carrier's knowledge, refund may be made to the payer: Opinion of Attorney-General, May 13, 1935.

Remarriage. Commuted award correct at time it was made was held not affected by subsequent remarriage of widow before payment thereof into the Aggregate Trust Fund. Gibson v. Policastro, 255 App. Div. 427; 204 S. B. 427; Thorgensen v. Movietonews, 255 App. Div. 728; 204 S. B. 427; Goldstein v. Lackawanna Steel Construction Corp., 261 App. Div. 856.

§ 28. **Limitation of right to compensation.** The right to claim compensation under this chapter shall be [1]barred, [2]except as hereinafter provided, unless within one year after the accident, or if death results therefrom, within one year after such death, a claim for compensation [3]shall be filed with the [4]commissioner, but the employer and insurance carrier shall be deemed to have waived the bar of the statute unless the objection to the failure to file the claim within one year is raised [5]on the [6]first hearing [7]on such claim [8]at which all parties in interest are present. [9]No case in which an advance payment is made [10]to an employee or to his dependents in case of death shall be barred by the failure of the

employee [11]or his dependents to file a claim, and the board may at any time order a hearing on any such case in the same manner as though a claim for compensation had been filed. [12]The board may, however, by unanimous vote of the members qualified to act, permit the filing of a claim for compensation after the expiration of one year from the date of accident [13]or death, but not exceeding two years after the date of such accident [13]or death, when it shall find that such filing shall be in the interest of justice; and may order a hearing and make such award or decision on such claim as though the claim for compensation had been filed within the time prescribed in this section. [*As am'd by L.* 1918, *ch.* 634; *L.* 1922, *ch.* 615; *L.* 1925, *ch.* 658; *L.* 1928, *ch.* 754; *and L.* 1930, *ch.* 316.]

[1] Word "forever" stricken out by L. 1922, ch. 615.

[2] Words "except as hereinafter provided" inserted by L. 1928, ch. 754.

[3] Word "thereunder" stricken out by L. 1922, ch. 615.

[4] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.

[5] Words "before the commission" stricken out by L. 1922, ch. 615.

[6] Word "first" inserted by L. 1925, ch. 658.

[7] Words "on such claim" substituted for words "of a claim for compensation filed by the injured employee, or his or her dependents" by L. 1922, ch. 615.

[8] Words "at which all parties in interest are present" inserted by L. 1925, ch. 658.

[9] Following sentence added by L. 1922, ch. 615, in lieu of identical provision in former § 20-a.

[10] Words "to an employee . . . of death" inserted by L. 1930, ch. 316.

[11] Words "or his dependents" inserted by L. 1930, ch. 316.

[12] Remainder of section added by L. 1928, ch. 754.

[13] Words "or death" inserted by L. 1930, ch. 316.

The Department of Labor supplies blank forms for claims, Nos. C-3, C-62 and C-63.

Reference to court opinions and decisions under this section are in 162 S. B. 179, 188–191; 185 S. B. 565; and 204 S. B. 429–439.

Besides the exceptions declared by the concluding sentences of this section, further exceptions are declared by § 115, below.

Advance payment—what constitutes. Payment of full wages to injured employee notwithstanding he lost half days "here and there . . . when he had to go to the doctor for treatments in the afternoon," was held to constitute "advance payment" of compensation: Schwartz v. Jacobs Bros Co., 247 App. Div. 848; 271 N. Y. Rep. 640; 204 S. B. 431.

Payment of wages for one and three-quarter hours lost at time of accident and immediate provision of medical treatment by employer were held not to constitute "advance payment": Lissow v. Mabbett Motors, Inc., 253 App. Div. 858; 279 N. Y. Rep. 585; 204 S. B. 430.

A policeman who received head injuries in 1933 was given immediate medical attention and sent home for the rest of the day. Thereafter he continued at work for more than two years until relieved of duty and placed on sick leave, with pay, because of impaired vision due to optic atrophy. The employer and employee filed requisite compensation forms with the Department of Labor for the first time during this sick leave period. Claim was held saved by "advance payments": Hamilton v. Incorporated Village of Lynbrook, 258 App. Div. 1012; 284 N. Y. Rep. 613; 204 S. B. 429.

The "advance payment" exception is interpreted in Kloberdanz v. Sheffield Farms Co., Inc., 260 App. Div. 823; Gabrielli v. City of New York, 258 App. Div. 1015; 204 S. B. 433; Gabriel v. Brooklyn-Manhattan Transit Corp., 254 App. Div. 789; 204 S. B. 401; Pepe v. Sheffield Farms Co., Inc., 254 App. Div.

611; 204 S. B. 434; Sychowski v. Greenpoint Laundry, 258 App. Div. 833; 204 S. B. 434; Wissner v. Sheffield Farms Co., Inc., 254 App. Div. 611; 204 S. B. 435; Duquette v. General Electric Co., 255 App. Div. 892; 204 S. B. 434; Casale v. Rockwood & Co., 259 App. Div. 767; 204 S. B. 432; Seely v. Phoenix Transit Co., 241 App. Div. 183; 185 S. B. 507; Gould v. Champeney & Turk, 275 N. Y. Rep. 564; 204 S. B. 431; Sherry v. Luxor, 241 App. Div. 899; 185 S. B. 508; Fish (Leo) v. Rutland R. R. Co., 209 App. Div. 303; 133 S. B. 225; Giamelli v. Rahtz, 209 App. Div. 720; 133 S. B. 224; Bagnano v. Smith-Hamburg-Scott Welding Co., 35 S. D. R. 607; 218 App. Div. 795; 156 S. B. 297; and Lawrence v Central Mercantile Bank, 218 App. Div. 803; 156 S. B. 297. To establish a further exception to this section in relief of such cases as Decker v. Pouvailsmith Corp., 252 N. Y. 1; 9 Ind. Bul. 24, Laws of 1930, ch. 327, 165 S. B. 16, 38, applies § 23 of the Civil Practice Act to the Workmen's Compensation Law.

Awards to or from special funds—claim requirements. Failure to file claim does not prevent awards to the special funds established by subdivisions 8 and 9 of § 15, above: State Treasurer ex rel. Hasson v. Gude Co., 222 App. Div. 708; 161 S. B. 249.

Failure to file claim within one year prevented award from the special fund of subd. 8 of § 15: Martin v. Wurlitzer Co., 249 App. Div. 321; 204 S. B. 309.

General and special employers—claim filing. Failure to file claim against special employer figured in Proctor v. Willard Parker Hospital and Genesee Hospital, ex rel., 256 App. Div. 1018; 204 S. B. 3, which involved general and special employers.

Notice of claim—form and content. Wording, form and method suffice when it is reasonably to be inferred that a claim is being made: Kaplan v. Kaplan Knitting Mills, 248 N. Y. 10; 156 S. B. 291; Plouff v. Port Henry L. H. & P. Co., 250 N. Y. Rep. 616; 161 S. B. 223; sufficiency of form also figured in O'Esau v. Bliss Co., 185 App. Div. 900; 224 N. Y. Rep. 701; 95 S. B. 261; Granofsky v. Bing & Bing Construction Co., 181 App. Div. 909; 140 S. B. 232; Giamelli v. Rahtz, 209 App. Div. 720; 133 S. B. 224; and Bednarczyk v. Reagan, 22 S. D. R. 604. The courts upheld claim filed by an attorney: Lazich v. Wickwire Spencer Steel Co., 262 N. Y. Rep. 668; 185 S. B. 136.

Time limit—extension. Action of the Industrial Board four years after accident extending filing time on a compensation claim which had been submitted six months beyond the one-year time limit was sustained: Porter v. Van Dorn Iron Works, 257 App. Div. 1087; 204 S. B. 436.

In the case of a sixteen year old incompetent claimant the Industrial Board extended the time for claim filing for a period less than two years after the time claimant attained his majority: Naylor v. Carey, 250 App. Div. 792; 204 S. B. 409.

The Appellate Division affirmed action of the Board permitting claimants to file claim more than one year after the accidents, their claims having accrued less than a year before L. 1928, ch. 754, became effective: Orton v. Olds Motor Works, 229 App. Div. 46; 185 S. B. 497; Davis v. Rust, 231 App. Div. 336; 185 S. B. 498; Callow v. Feinberg, 232 App. Div. 860; 185 S. B. 500.

Waiver of claim filing—failure to object at first hearing. Under this section, as it stood before amendment of it by L. of 1925, ch. 658, effective April 11, 1925, a carrier could avoid waiver by raising objection at *any* hearing prior to award: Kraemer v. Mergenthaler Linotype Co., 198 App. Div. 60; 114 S. B. 121; even though it first raised such objection more than a year after the accident: Chefety v. Hearn & Son, 212 App. Div. 844; 140 S. B. 234. Under the section as it has stood subsequent to the amendment the carrier waives its right by failing to object at the very first hearing even though such hearing occurs within a few days after accident: Pendola, Walters and other cases cited in 161 S. B. 248 and in current indexes under title "Claim filing," 8 Ind. Bul. 630, 738; 9 Ind. Bul. 171; 10 Ind. Bul. 62, etc. The employer must be on notice at the first hearing that claim is being made against him: Davis v. Butler, 194 App. Div. 58; 114 S. B. 137.

A carrier may take the objection that claim has not been filed within a year without co-operation of the employer: Cheesman v. Cheesman, 236 N. Y. 47; 123 S. B. 93.

Withdrawal of claim—effect. For withdrawal of a claim and revival of it afterward, compare Joyce v. Eastman Kodak Co., 238 N. Y. 142; 133 S. B. 227; compare also § 32, below, commented upon in Jones v. Republic L. H. & P. Co., 230 App. Div. 745; 185 S. B. 63.

General notes. Consular officers may file claims on behalf of their nationals: Burak v. Lockport Light & Heat Corp., 256 N. Y. Rep. 577; 10 Ind. Bul. 229; Marchetti v. Bernagozzi, 26 S. D. R. 230; 199 App. Div. 948; 233 N. Y. Rep. 538; 114 S. B. 86; Hunko v. Buffalo Crushed Stone Co., 203 App. Div. 284; 123 S. B. 111; Di Ionna v. Terry & Tench Co., 203 App. Div. 270; 123 S. B. 36; Converso v. Union Bag & Paper Co., 220 App. Div. 788; 156 S. B. 294. See also 162 S. B. 189.

A claimant who has made claim against a wrong party is debarred from compensation if he does not make claim against the right party within a year after the accident: Davis v. Butler, 194 App. Div. 58; 114 S. B. 137; Schweitzer v. Reyelts & Eppler, 212 App. Div. 842; 140 S. B. 198; Warner v. Lambert, 215 App. Div. 741; 149 S. B. 268.

Proof of mailing a claim to the Department in a properly addressed and stamped envelope is not sufficient proof of filing: Cheesman v. Cheesman, 203 App. Div. 533; 236 N. Y. 47; 123 S. B. 113.

Concerning dependency of claim for death benefits upon prior claim for disability compensation, see Whitmyre v. International Business Machines Corp., 267 N. Y. 28; 185 S. B. 489; Wright v. Brooklyn Union Gas Co., 190 App. Div. 824; 98 S. B. 89; 30 S. D. R. 671; 209 App. Div. 844; 140 S. B. 229, 230; Snow v. U. S. R. R. Administration, 209 App. Div. 308; 133 S. B. 194; affd., 239 N. Y. Rep. 528.

In an election to sue a third party prior to the amendment of § 29 by ch. 684 of L. 1937, a clause reserving "all further rights and remedies" suffices to avoid this time limit: Ridout v. Rodgers & Hagerty, 14 S. D. R. 710, 3 Bull. 101; 185 App. Div. 901; 224 N. Y. 711; 95 S. B. 254; Garlapow v. Zuckmaier Bros., Death File No. 18541; 181 App. Div. 962; 95 S. B. 254; Brewinski v. Pullman Co., 17 S. D. R. 644, 4 Bul. 24; Hagedorney v. National Sugar Refining Co., 21 S. D. R. 368, 5 Bul. 27; Bennett v. Page Bros., 197 App. Div. 745; 114 S. B. 138. See topic "Choice of remedy," 185 S. B. 395–419.

If no claim has been filed, the Board may not award expense of medical care and treatment: Staff v. Eagle Warehouse & Storage Co., 30 S. D. R. 326; 209 App. Div. 307; 133 S. B. 170.

The Board awarded benefits to a widow and child in Hungary though, because of war, claim was not filed for them till nearly five years after the accident; the carrier, being the state fund, did not appeal: Koblak v. Wickwire Steel Co., 30 S. D. R. 436; 210 App. Div. 802; 140 S. B. 167.

The court assumed under § 21 that claim had been filed within a year: Hansen v. Flinn-O'Rourke Co., 192 App. Div. 878; 114 S. B. 86.

For instances of claims barred by time, see Nesofsky v. Ragorotsky, 274 N. Y. Rep. 596; 204 S. B. 148; Price v. Peene's Express Co., 236 App. Div. 864; 185 S. B. 510; Angelucci v. Kerbaugh, 9 S. D. R. 387; Roso v. State Insurance Fund, 11 S. D. R. 600; Leczowski v. Lafave & Bellinger, 14 S. D. R. 701, 3 Bul. 81.

The day from which this time limit is reckoned must be excluded from the reckoning: Hudspith v. Pierce-Arrow Motor Car Co., 180 App. Div. 147; 95 S. B. 256.

The amendment to this § 28 effected by ch. 658 of the Laws of 1925 was held to be retroactive in Johnson v. American Machinery & Foundry Co., 230 App. Div. 585; 185 S. B. 509.

The Commission set up the doctrine that the employer's conduct estopped him from pleading the employee's failure to file a claim within the year's time limit by reason of the employer's false representation to induce the employee not to file a claim in Twonko v. Rome Brass & Copper Co., Claim No. 35307, Oct. 22, 1917; and by reason of the employer's continuing the employee at work and wages for more than a year after the accident in O'Esau v. Bliss Co., 14 S. D. R. 696, 3 Bul. 79; DeGaglio v. Bradley Contracting Co., 15 S. D. R. 590, 3 Bul. 120; and Deecke v. Huyler's Corp., 15 S. D. R. 671, 3 Bul. 169. Additional ground of estoppel in the DeGaglio case was the periodic payment by the employer of sums

of money to the employee, as if by way of compensation, and in the Deecke case, conduct of the employer inducing the employee to undergo an operation. The Appellate Division sustained, but the Court of Appeals reversed the Commission's finding of false representations in the Twonko case: 183 App. Div. 292; 224 N. Y. 263; 95 S. B. 257, 258. The Appellate Division reversed the award in the DeGaglio case: 184 App. Div. 243; 95 S. B. 264, 265, and the disability award in the O'Esau case, 188 App. Div. 385; 95 S. B. 261. See also Howe v. Aluminum Company of America, 6 Bul. 5.

§ 29. [1]**Remedies of employees; [2]subrogation.** [3]1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, [4]need not elect whether to take compensation under this chapter or to pursue his remedy against such other [5]but may take such compensation and at any time either prior thereto or within six months after the awarding of compensation, pursue his remedy against such other subject to the provisions of this section. If such injured employee, or in case of death, his dependents, take or intend to take compensation under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the commissioner, the employer and the insurance carrier upon a form prescribed by the commissioner.

[1] Word "Remedies" substituted for words "Subrogation to remedies" by L. 1937, ch. 684.

[2] Word "subrogation" inserted by L. 1937, ch. 684.

[3] Subdivision number supplied by L. 1937, ch. 684.

[4] Words "need not" substituted for words "shall, before any suit or any award under this chapter" by L. 1937, ch. 684.

[5] Words "but may . . . by the commissioner" substituted for words "Such election shall be evidenced in such manner as the commissioner may by regulation prescribe" by L. 1937, ch. 684.

Chapter 684, Laws of 1937—retroactivity. Chapter 684, Laws of 1937, which amended this section to permit an injured employee or, in case of death, his dependents, to take compensation and at any time prior to or six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues to start suit against a third party responsible for the accident was held applicable where the injury occurred before

the effective date of the amendment but no award of compensation was made nor any action instituted until after such date: Hession v. Sari Corp., 258 App. Div. 969; 283 N. Y. 262; 204 S. B. 450.

Actions by carriers to recover medical expenses. An insurance carrier, as subrogee of employer, was held entitled to recover from third party the expenses of medical treatment furnished to an injured employee where the latter did not take compensation but instituted and settled a third party action: Butchers Mutual Casualty Co., of New York v. Emerald Cab Corp., 174 Misc. 1; 204 S. B. 228.

The three year statute of limitations was held applicable where a carrier sued to recover medical expenses under this section: U. S. Casualty Co. v. North American Brewing Co., 279 N. Y. Rep. 762; 204 S. B. 447.

[1]2. If such injured employee, or in case of death, his dependents, [2]has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. [3]If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. When the compensation awarded requires periodical payments the number of which cannot be determined at the time of such award, the board shall, when the injury or death was caused by the negligence or wrong of another not in the same employ, estimate the probable total amount thereof upon the basis of the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and such facts as it may deem pertinent, and such estimate shall be deemed the amount of the compensation awarded in such case, for the purpose of computing the amount of such excess recovery, subject to the modification thereof as hereinafter provided.

[1] Subdivision number supplied by L. 1937, ch. 684.

[2] Words "has taken . . . such failure" substituted for words "elect to take compensation under this chapter, the awarding of compensation" by L. 1937, ch. 684.

[3] Remainder of this subdivision added by L. 1935, ch. 328.

[1]3. In the event of a modification of an award increasing the compensation previously awarded or in the event that the total amount of periodical payments made pursuant to an award under which the number of such payments could not be determined at

the time of the award, shall exceed the total thereof as estimated by the board, the principal of any of such excess recovery theretofore paid to such injured employee or his dependents shall be credited against such increase or such excess. In the event of a modification of an award ending or diminishing the compensation previously awarded or in the event that the total amount of periodical payments made pursuant to an award under which the number of such payments could not be determined at the time of the award, shall be less than the total thereof as estimated by the board, such fund, person, association, corporation or carrier shall forthwith pay to such injured employee or his dependents, as the case may be, any additional amount of such excess recovery to which such injured employee or his dependents may be entitled by reason of such modification or such deficiency, determined as hereinbefore provided.

[1] Subdivision number supplied by L. 1937, ch. 684. Paragraph inserted by L. 1935, ch. 328.

[1]4. [2]If such injured employee, or in case of death, his dependents, proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case.

[1] Subdivision number supplied by L. 1937, ch. 684.

[2] Words "If such . . . dependents substituted for words "and if he" by L. 1935, ch. 328 and words "shall elect to" eliminated by L. 1937, ch. 684.

Deficiency compensation—determination. Attorney's fee should be deducted from the recovery in a third party action in computing the deficiency which the insurance carrier must contribute. "Actually collected," as used in this subdivision must be construed to mean the net amount collected after deduction of all reasonable and necessary expenses including attorneys' fees. Hobbs v. Dairymen's League Co-operative Assn., 258 App. Div. 836; 282 N. Y. Rep. 710; 204 S. B. 452. See also Borgio v. Hegeman Farms Corp., 262 App. Div. 921, July 2, 1941, and Curtin v. City of New York, 262 App. Div. 918, July 2, 1941.

[1]5. In case of the payment of an award to the [2]commissioner of taxation and finance in accordance with subdivisions [3]eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. Such a cause of action assigned to the state may be prosecuted or compromised [4]in the name of the state insurance fund by the [5]commissioners of the state insurance fund. A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the [6]com-

missioners of the state insurance fund or such officer thereof designated by them, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same.[7]

[1] Subdivision number supplied by L. 1937, ch. 684. Sentence "In case of . . . of the deceased" inserted by L. 1922, ch. 615.

[2] Words "commissioner of taxation and finance" substituted for words "state treasurer" by L. 1935, ch. 328.

[3] Erroneous reference "nine and ten" corrected to "eight and nine" by L. 1924, ch. 499.

[4] Words "in the name of the state insurance fund" inserted by L. 1939, ch. 98.

[5] Words "commissioners of the state insurance fund" substituted for word "commissioner" by L. 1939, ch. 98.

[6] Words "commissioners . . . designated by them" inserted by L. 1939, ch. 98.

[7] A paragraph regarding election to sue when claimants are minors eliminated by L. 1937, ch. 684.

Laws of 1937, Chapter 87, reenacted the provisions of Subd. 5 of this section and amended it as indicated below, referring to it, however, as Subd. 6. Laws of 1937, Chapter 684, and Laws of 1939, Chapter 98, which subsequently amended Subd. 5 did not incorporate the change effected therein by L. 1937, Chapter 87. Laws of 1937, Chapter 87, read as follows:

"6. In case of the payment of an award to the commissioner of taxation and finance in accordance with subdivisions eight and nine of section fifteen *and in accordance with section twenty-five-a* such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. Such a cause of action assigned to the state may be prosecuted or compromised by the commissioner. A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commissioner, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same." [*Matter in italics was added by L.* 1937, *ch.* 87.]

[1]6. The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ. [*Section* 29 *am'd by L.* 1916, *ch.* 622; *L.* 1917, *ch.* 705; *L.* 1922, *ch.* 615; *L.* 1924, *ch.* 499; *L.* 1934, *ch.* 695; *L.* 1935, *ch.* 328; *L.* 1937, *chs.* 87, 684; *L.* 1939, *ch.* 98.]

[1] Subdivision number supplied by L. 1937, ch. 684. Paragraph added by L. 1934, ch. 695.

General Notes on § 29

The following court decisions relative to this § 29 were decided prior to the amendment thereof by chs. 87 and 684 of the Laws of 1937:

Actions by carriers to recover medical expenses. Upon an election to sue or the bringing of a suit against a third party, the employer's liability for medi-

cal care and treatment ceases in accordance with subd. (c) of § 13, above: Beekman v. Paskin, 147 Misc. 563; 185 S. B. 426; Magrossi v. City of Niagara Falls, 243 App. Div. 827; 14 Ind. Bul. 85. In accordance with such § 13, as am'd by L. 1927, ch. 553, the employer has a general and additional right of action against a third party for medical care and treatment not only in cases of award under subds. 8 and 9 of § 15, above, but in all cases. The amendments to §§ 13 and 29 giving additional cause for action against third parties for the expense of medical treatment may be read in the light of Zurich General A. & L. Ins. Co. v. Childs Co., 253 N. Y. 324; 185 S. B. 456, 457; Bossert & Sons v. Piel Bros., 112 Misc. 117; 114 S. B. 13; Miller v. Rochester G. & E. Co., 206 App. Div. 723; 123 S. B. 11; and Lebanon Hospital v. Union Ry. Co., 32 S. D. R. 137; 213 App. Div. 839; 140 S. B. 118.

The employer's right against the third party for the expense of medical treatment is not affected by a general release given to the third party by the injured employee: Commercial Casualty Insurance Co. v. Dwyer, 137 Misc. 440; 185 S. B. 460.

In an action by a carrier against a third party to recover payments for medical treatment rendered to its assured's employee, the court held that the approval of the Industrial Board is not required in cases coming within § 13, subd. (c): Liberty Mutual Ins. Co. v. N. Y. & Queens E. L. & P. Co., 161 Misc. 491; 204 S. B. 388. Compare earlier case, Travelers Ins. Co. v. Terminal Cab Corp., 146 Misc. 274; 185 S. B. 457.

Co-employees, actions against. See title, "Third parties defined," below.

Deficiency compensation—determination. In determining deficiency compensation due a widow, the carrier was credited with one-third of the proceeds of a third party action instituted by the widow and children: Bachman v. Seitz, Inc., 254 App. Div. 159; 204 S. B. 457.

Decedent was killed in course of his employment by the negligence of a third party. His three adult children released to their widowed mother their respective distributive shares in the proceeds of a third party action. In determining the widow's deficiency compensation the carrier was credited with only one-third of the recovery. Decision affirmed. O'Brien v. N. Y. Water Service Corp., 258 App. Div. 1014; 204 S. B. 457.

The employer or his insurance carrier is entitled to have amounts paid by the third party to the claimant deducted from an award: Zirpola v. Casselman, 237 N. Y. 367; 123 S. B. 84; Egan v. Otis Elevator Co., 209 App. Div. 332; 133 S. B. 214; Dietz v. Solomonwitz, 12 S. D. R. 555, 2 Bul. 102; 179 App. Div. 560; 87 S. B. 278; Matta v. Dennings Point Brick Works, Death File No. 14895; 182 App. Div. 907; 224 N. Y. 596; 87 S. B. 283; Solomone v. Degnon Contracting Co., 20 S. D. R. 456, 5 Bul. 28; 194 App. Div. 50; 114 S. B. 126; Maley v. O'Boyle, 10 S. D. R. 612. Equity will impress a carrier's lien upon damages recovered from a third party in New York for compensation paid in New Jersey: Hartford Accident & Indemnity Co. v. Chartrand, 239 N. Y. 36; 133 S. B. 212. The Department should deduct only claimant's distributive share of such payments: Zirpola v. Casselman, 204 App. Div. 647; 237 N. Y. 367; 123 S. B. 84.

Deficiency compensation should be calculated upon the amount actually collected in the action for damages, though such amount includes interest and costs: Campbell v. Monteleone, 243 App. Div. 157; 185 S. B. 433; and though such amount is liable for attorney's contingent fee, medical and funeral expenses, special guardian fee and surety bond premium: Kabel v. Lane Engineering Co., 196 App. Div. 669; 114 S. B. 130. In determining deficiency compensation due a dependent mother, the Appellate Division credited her with one-half the judgment, including interest but excluding costs, recovered in a third party action by the mother and a non-dependent father. It allowed her $100 reimbursement for her contribution to the funeral expenses through reduction of her share of the recovery by that amount. The Court of Appeals refused the allowance of $100: Mundt v. Spencer & Son Contr. Corp., 250 App. Div. 693; 276 N. Y. Rep. 677; 204 S. B. 453. Deficiency compensation may not be ascertained by commuting compensation actuarially; Rule 34 is ultra vires: Mohr v. Wiebusch & Hilger, 247 App. Div. 679; 272 N. Y. Rep. 655; 204 S. B. 455. Since this decision Rule 34 has been superseded by Rules 59 and 60 in Special Bulletin No. 190.

Claimants having recovered $3,500 in suit against a third party, the Commission held that they should begin to receive compensation at the end of a period covered by the $3,500: Sztorc v. Stansbury, 18 S. D. R. 621, 4 Bul. 102.

For cases involving the determination of deficiency compensation since the enactment of L. 1937, ch. 684, see notes under subd. 4, above.

Discontinuance of third party action. If an injured employee, or his beneficiary, having elected to sue and having even commenced suit, abandons or discontinues the action without releasing the third party for a consideration, an award of compensation is valid if made before the statute of limitations prevents the employer's carrier from starting subrogation suit against the third party: Stout v. Prudential Ins. Co., 276 N. Y. Rep. 578; 204 S. B. 459; Rizzuto v. Prudential Ins. Co., 276 N. Y. Rep. 580; 204 S. B. 459; Nichols v. Mohawk Dock & Dredge Co., 223 App. Div. 803; 185 S. B. 414; Palermo v. Friederich, 242 App. Div. 743; 185 S. B. 414; Hares v. Day Motor Co., 242 App. Div. 883; 185 S. B. 415; but is not valid if made after the statute of limitations prevents the carrier from starting suit: McKee v. White, 218 App. Div. 300; 244 N. Y. Rep. 701; 149 S. B. 238; Breital v. Hinderstein, 236 App. Div. 203; 261 N. Y. Rep. 556; 185 S. B. 416; Cole v. Gold Medal Cone Co., 261 N. Y. Rep. 704; 11 Ind. Bul. 335; Kavanaugh v. Belden, 231 App. Div. 412; 185 S. B. 418; Waltanen v. Acle Construction Co., 231 App. Div. 776; 185 S. B. 415; overruling Bennett v. Page Bros., 197 App. Div. 745, 114 S. B. 133, and confirming Easter v. Washington Heights Van Co., 16 S. D. R. 438, 3 Bul. 176. By their conduct the employer and the carrier may waive the running of the time limit and so leave the way open for compensation award: Burmester v. De Lucia, 237 App. Div. 149; 263 N. Y. 315; 185 S. B. 443–446. Compare Exchange M. I. Insurance Co. v. Central Hudson Gas & Electric Co., 243 N. Y. 75; 156 S. B. 257; McCann v. Baker Elevator Corp., 264 N. Y. Rep. 529; 185 S. B. 396–399; Randall v. Jones, 241 App. Div. 783; 185 S. B. 400; Lawson v. Goldstein & Bernikow, 236 App. Div. 870; 11 Ind. Bul. 444; and McMahon v. Carll, 228 App. Div. 741; 9 Ind. Bul. 113. In the Lawson and Randall cases, the Attorney-General argued that dismissal of the injured employees' suits by judgment "upon the merits" permitted compensation award though the time limit against subrogation suit had begun to operate.

Failure to prosecute in good faith a third party suit commenced by deceased son's administrator was held not a bar to claim of non-resident alien dependent mother: Markise v. Quaker Food Stores, 257 App. Div. 886; 204 S. B. 460.

Laws of 1937, ch. 684, effective September 1, 1937, removed from § 29 the requirement that, when an accident is due to the negligence or wrong of a third party, an injured employee or, in case of his death from the accident, his dependents must choose to take compensation or to sue the third party. It permits the employee or his dependents to take compensation and at any time prior to or six months after the awarding of compensation and in any event within one year from the date of accrual of the action to start suit against a third party responsible for the accident.

Election to take compensation—what constitutes. Acceptance of compensation or of a sum in settlement of an action constitutes an election of remedy: Beekman v. Brodie, 223 App. Div. 204, affd., 249 N. Y. 175; 161 S. B. 224; Santo v. Santini Storage Co., 142 Misc. 388; 185 S. B. 412. Filing a claim and accepting compensation does not constitute an election of compensation if the claimant does not know of his alternative right to sue: Liston v. Hicks, 243 App. Div. 159; 269 N. Y. Rep. 535; 185 S. B. 406; 204 S. B. 461; Ellich v. H. A. Gesellschaft, 226 App. Div. 32; 252 N. Y. Rep. 541; 161 S. B. 205; Lassell v. Mellon, 219 App. Div. 589; nor does accepting medical treatment and appearing at hearings if the injured employee does not file claim or cash compensation checks: Dyer v. Central Savings Bank, 137 Misc. 509; 185 S. B. 404; compare Attorney-General's Opinion, July 21, 1936.

Laws of 1937, ch. 684, effective September 1, 1937, permits an employee or his dependents to take compensation and at any time prior to or six months after the awarding of compensation and in any event within one year from

the date of accrual of the action to start suit against a third party responsible for the accident.

Judgment in third party case uncollectible pending reorganization—effect. A travelling salesman was killed in the course of his employment. His widow filed notice of election to sue the railroad company responsible for his death and in subsequent action recovered judgment in the sum of $117,065.23. Prior to the entry of said judgment the railroad company filed a petition in the District Court of the United States for reorganization under § 77-b of the Bankruptcy Act and an order had been entered in the proceedings enjoining all creditors and claimants from taking action toward collecting their judgments or claims. In 1939, more than ten years after the accident and after the widow had exhausted all her efforts to collect said judgment without success, no plan for the payment of creditors having been promulgated, said widow applied to the State Industrial Board for compensation. In subsequent proceedings in the Department of Labor the Board directed the widow to assign said judgment to the workmen's compensation insurance carrier to the extent of compensation payments to be made to her and her children and awarded death benefits against such carrier. Award was affirmed. Gelbin v. Metro Goldwyn Mayer Pictures, 261 App. Div. 196.

Preference under Civil Practice Act. Preference under § 138, subd. 21, of the Civil Practice Act was held unaffected by § 29, subd. 1: McGlone v. Nann Trucking Co., 169 Misc. 590; 256 App. Div. 549; 204 S. B. 462.

Section 138, Subd. 21, of the Civil Practice Act, as amended by Ch. 259, Laws of 1932, gave to suits against third parties under this § 29 twenty-first place in the order of prefernce of civil causes for trial or hearing. Chapter 247, Laws of 1940, effective September 1, 1940, eliminated said Subd. 21 from § 138 and added a new section, § 140, to the Civil Practice Act which provides that the justices of the Appellate Division of the Supreme Court shall have the power to adopt, amend and rescind rules regulating preferences in the trial or hearing of civil causes.

Release of third party claim—what constitutes. Where the evidence indicated that claimant was inveigled into executing a general release, it was held that the burden of establishing that the release was obtained honestly was upon the carrier: Selig v. Interstate Hosiery Mills, Inc., 254 App. Div. 616; 204 S. B. 463.

Settlement of third party claim—what constitutes. A third party action was instituted by the committee of an incompetent claimant. During the progress of the trial, the defendants in the third party action having stipulated their liability and having moved to withdraw a juror, the trial justice presiding assessed damages in the sum of $5,500 against said defendants. Decision that the claimant was entitled to deficiency compensation on the ground that no compromise of the third party action had been effected within the meaning of § 29 was upheld. Tubis v. Weaderhorn, Inc., 260 App. Div. 823; 285 N. Y. Rep. —.

Acceptance by a widow of judgment by confession in a third party action without written consent of the carrier prevented award to her for deficiency: Kirby v. Bloomingdale Bros., 256 App. Div. 1016; 204 S. B. 470.

The Court of Appeals, reversing the Appellate Division, held that stipulation to reduce a verdict to an amount judicially determined as not excessive is not a compromise: Gallagher v. Carol Const. Co., 272 N. Y. 127; 204 S. B. 465; but compare Gilman v. Barden, 249 App. Div. 665; 204 S. B. 471, in which an agreement entered into by parties to a third party action and judgment entered without knowledge or consent of the employer was deemed a compromise.

Acceptance of monetary gift from a third party was held not to constitute a compromise: Maynard v. Board of Education, School District No. 4, Town of Greenburgh, 255 App. Div. 908; 204 S. B. 93.

Settlement of third party claim without consent—effect. Compromise of a suit by an employee without the carrier's "written approval" excludes deficiency compensation, Roth v. Harlem Funeral Car Co., 243 App. Div. 459; 268

N. Y. Rep. 661; 185 S. B. 437; 204 S. B. 471; McConvey v. Donovan Haas Co., 227 App. Div. 825; 253 N. Y. Rep. 538; 185 S. B. 435; O'Brien v. Knickerbocker Ice Co., 213 App. Div. 464; 140 S. B. 212; Minchin v. Eaton, 242 App. Div. 719; 185 S. B. 434; release of a third party without instituting a suit, if valid because of absence of fraud or mistake, is in effect an election to sue and a compromise and, therefore, relieves the employer's carrier from payment of deficiency compensation if such carrier has not consented to the release or waived consent by its conduct and if the Industrial Board upon voluntary surrender of the release by the third party, has not awarded compensation in time for the carrier to commence suit: Beekman v. Brodie, 223 App. Div. 204; 185 S. B. 401; Standard Accident Insurance Co. v. N. Y. Central R. R. Co., 261 N. Y. Rep. 577; 185 S. B. 402; Munro v. Henryson & Co., 241 App. Div. 892; 265 N. Y. Rep. 532; 185 S. B. 402; Randazzo v. Whitmore, Rauber & Vicinus, 235 App. Div. 753; 185 S. B. 404; Opinion of Attorney-General, May 26, 1936; relative to time and execution of the carrier's approval, see Lee v. City of Batavia, 242 App. Div. 744, and Opinion of Attorney-General, May 11, 1933; the employee may not back out of a compromise and proceed with the suit: O'Brien v. Lodi, 246 N. Y. 46; 156 S. B. 266; compare Hughes v. Waterson, Berlin & Snyder Co., 254 N. Y. Rep. 607; 10 Ind. Bul. 56; Beekman v. Brodie, 223 App. Div. 204; 156 S. B. 268; 249 N. Y. 175; 161 S. B. 224; 185 S. B. 401; Woodward v. Conklin & Son, 171 App. Div. 736; 81 S. B. 336; 95 S. B. 269. Such compromise also excludes medical reimbursement: Hunkle v. Tyron Oil Co., 33 S. D. R. 463. The employee should carefully preserve the "written approval": Terracino v. Masten Construction Co., 218 App. Div. 803; 156 S. B. 265. The employer's conduct relative to compromise constituted waiver of his rights in Beekman v. Brodie, 249 N. Y. 175; 161 S. B. 224; and the carrier's conduct in Standard Accident Insurance Co. v. N. Y. Central R. R. Co., 261 N. Y. Rep. 577; 185 S. B. 401, 402; Renouf v. Darrone, 226 App. Div. 839; 185 S. B. 401; and Clow v. Keith's Fordham Theatre, 221 App. Div. 826; 347 N. Y. Rep. 583; 156 S. B. 276. Consent to compromise not only of the carrier but of the employer is requisite if deficiency compensation is to be awarded against both: Pizcz v. Schultz, 236 App. Div. 552; 185 S. B. 439. The court upheld terms of compromise in Maurin v. Baumgard, 240 App. Div. 292; 185 S. B. 441. Time limits upon entry of hospitals or sanitariums for the purpose of negotiating settlements with injured employees under this § 29 are imposed by § 270-b of the Penal Law, enacted by L. 1935, ch. 578: Opinion of Attorney-General, September 7, 1935.

Question whether self-insuring employer by its conduct was estopped from objecting to a deficiency award on the ground that claimant settled his third party action without its written consent, figured in Feiertag v. Postal Telegraph Co., 256 App. Div. 866; 18 Ind. Bul. 98.

Subrogation—voluntary coverage. A self-insured employer having voluntarily paid compensation to an employee injured by a third party was permitted to sue the latter as subrogee even though the employee was not engaged in an enumerated hazardous occupation: City of New York v. Steers & Menke and Dahlman, 167 Misc. 566; 254 App. Div. 669; 204 S. B. 230.

Third parties defined. The following have been held to be third parties: a real estate agency in charge of an employer's building, Kindga v. Noyes Co., 260 N. Y. Rep. 521; general contractors as concerns injury to their subcontractors' employees, Clark v. Monarch Engineering Co., 248 N. Y. 107; 156 S. B. 116; Jacobsen v. Babcock & Wilcox Co., 259 N. Y. Rep. 597; 185 S. B. 382. In sequence to the Court of Appeals decision in the Kindga case, the Department of Labor awarded deficiency compensation to the employee's widow against the building owner and its carrier (Case No. 3046361). For the general contractor's status when one subcontractor causes injury to another subcontractor's employee, see Stratton v. Kay, 246 App. Div. 659; 204 S. B. 464. The Court of Appeals has in effect held that a physician employed by an employer or carrier to treat an injured employee is a third party as concerns injury to the employee by malpractice: Parchefsky v. Kroll Bros., 267 N. Y. 410; 185 S. B. 369; compare Pardo v. Muccini & Decker, 266 N. Y. Rep. 564; 185 S. B. 375, 376. An owner of a

dance hall is a third party when a performer is under the control of a booking agent: Opinion of Attorney-General, June 29, 1936.

The courts reversed a determination of the Appellate Term, First Department, sustaining action of an employee against his employer as a third party, though the employer had secured compensation; the building where the accident, the collapse of an elevator, occurred, was owned by the employer but was entirely disconnected with his place of business: Winter v. Doelger Brewing Co., 95 Misc. 150; 175 App. Div. 796; 226 N. Y. Rep. 581; 87 S. B. 251.

Prior to the addition of the final paragraph to this § 29, co-employees were held to be third parties: Judson v. Fielding, 227 App. Div. 430; 253 N. Y. Rep. 596; 177 S. B. 190; Shelter v. Grobsmith, 143 Misc. 380; 177 S. B. 192.

A non-dependent mother may sue at common law a co-employee who negligently caused her son's death: Van Wormer v. Arnold and Dee, 255 App. Div. 233; 204 S. B. 439.

Workmen's compensation was held the sole remedy of an employee injured by the negligence of a co-employee: Fellows v. Seymour, 171 Misc. 833; 204 S. B. 441. Compare City of New York v. Fusco, 170 Misc. 564; 204 S. B. 443.

In a claimant's action against a third party, the employer's carrier is a proper co-plaintiff if the third party pleads that claimant elected to take compensation and received an award: Roecklein v. American Sugar Refining Co., 222 App. Div. 540; 156 S. B. 260; in a carrier's action against a third party a claimant is not a proper co-plaintiff: Lang v. Brooklyn City R. R. Co., 217 App. Div. 501; 149 S. B. 241; 247 N. Y. Rep. 551; 156 S. B. 264.

In action against third party, the employer may not be brought in as co-defendant and possible joint tort feasor: Thompson v. International Harvester Co., 141 Misc. 757; 177 S. B. 193.

Other cases. A claimant electing to sue a third party should also file a claim for compensation in order to escape the time limit prescribed by § 28, above. An election to sue reserving "all further rights and remedies" suffices to avoid such time limit: Ridout v. Rodgers & Hagerty, 14 S. D. R. 710; 3 Bul. 101; 224 N. Y. Rep. 711; 114 S. B. 158; Garlapow v. Zuckmaier Bros., 181 App. Div. 962; 95 S. B. 254; Jelliff v. Crescent Bread Co., 6 S. D. R. 511; Brewinski v. Pullman Co., 17 S. D. R. 644; 4 Bul. 24. Form No. C. D. 13, superseded by Form C-121, safeguards the interests of claimants by combining election to sue with claim of compensation for deficiency and timely statement of facts about the accident.

Election by the injured employee and recovery of compensation or damages by him in his lifetime does not preclude similar election and recovery by his beneficiaries in case he dies of his accident, but such part of the amount recovered by the employee as has come into possession of the beneficiaries is chargeable against them: Solomone v. Degnon Contracting Co., 20 S. D. R. 456, Bul. 28; 194 App. Div. 50; 114 S. B. 126.

Death of an injured employee from cause other than his accidental injury while he is suing a third party does not deprive his widow of deficiency compensation: Sienko v. Bopp & Morgenstern, 248 N. Y. 40; 156 S. B. 271.

An election to sue a third party for death of an employee made by persons entitled under the Decedent Estate Law to share in the proceeds of such suit and settlement of the suit by such persons without the carrier's consent does not deprive persons not entitled to share in such proceeds of death benefits under the Workmen's Compensation Law: Zirpola v. Casselman, 237 N. Y. 367; 123 S. B. 86; Petrone v. U. S. Trucking Corp., 236 App. Div. 531; 262 N. Y. Rep. 540; 185 S. B. 426; Wool v. Andrew's Auto Repair Shop, 220 App. Div. 792; Cahill v. Terry & Tench Co., 173 App. Div. 418; 81 S. B. 122; the latter persons' percentages of death benefits may not be greater than they would be if the former persons were claiming death benefits instead of suing: Plouff v. Port Henry Light, Heat & Power Co., 225 App. Div. 704; 250 N. Y. Rep. 616; 161 S. B. 221–223; Babb v. Conboy & Brown Construction Co., 240 App. Div. 11; 264 N. Y. 357; 185 S. B. 428–431; Russell v. 231 Lexington Ave. Corp., 236 App. Div. 177; 242 App. Div. 742; 266 N. Y. 391; 185 S. B. 365–368; Adleman v. Armstrong Publishing Co., 222 App. Div. 705; 161 S. B. 221, 222; a carrier may not sue the third party to recover its death benefit payments in such cases: Liberty Mutual Insurance Co. v. Mueller, 154 Misc. 718; 185 S. B. 431.

A salesman in the employ of a New York corporation having lost his life in Michigan and his widow, though receiving benefits under the New York Workmen's Compensation Law, having instituted action as administratrix in Michigan against a third party and received $7,411.74 in compromise, the Surrogate's Court of New York county awarded one-third of the amount to the carrier of the salesman's employer: Matter of Hertell Estate, 135 Misc. 36; 185 S. B. 389.

Denial of compensation for extra-territorial or other reason is immaterial as concerns right to an action against a third party: Royal Indemnity Co. v. Platt & Washburn Refining Co., 98 Misc. 631; 87 S. B. 273.

The courts sustained action by a carrier against a third party in a case of waiver of admiralty rights under § 113: Thompson v. Lumber Mutual Casualty Ins. Co., 134 Misc. 370; 137 Misc. 379; 234 App. Div. 841; 286 U. S. 527; 177 S. B. 267; 185 S. B. 461.

In action against third party, assumption of risk by the employee is not a defense: Liberty Mutual Insurance Co. v. White, 133 Misc. 847; 161 S. B. 208; the court should not admit evidence that plaintiff's employer was insured under compensation law except to prove that plaintiff has recovered compensation: Posnick v. Crystal, 181 App. Div. 660; 98 S. B. 75; Hubert v. Henderson-Johnson. Co., 235 App. Div. 765; 185 S. B. 425.

An employee, or his beneficiaries in case of his death, may sue a third party without giving the notice of election required by this § 29 but loses right to deficiency compensation by so doing: Lester v. Otis Elevator Co., 169 App. Div. 613; 81 S. B. 228; cited in Rosebrock v. General Electric Co., 236 N. Y. 238, 239.

Prior to the amendment of this § 29 by ch. 684, Laws of 1937, the Industrial Commissioner prescribed Form No. C. D. 13 for notice of election. This has been superseded by Form C-121, noted above. The Attorney-General has contended that use of Form C. D. 13 is not obligatory but merely helpful and that notice may be evidenced by other methods, as by declarations at hearings before referees; also that employers and carriers may waive such notice by their conduct: McCann v. Baker Elevator Corp., 264 N. Y. Rep. 529; 185 S. B. 396–399; McQuillan v. Todd, 226 App. Div. 838; 8 Ind. Bul. 633; Lawson v. Goldstein, 236 App. Div. 870; 11 Ind. Bul. 444.

After a wrongful recovery in a third party action by an unwitting bigamous widow on behalf of herself and her children, compensation was awarded to the lawful widow and to the illegitimate children of the other widow: Battalico v. Knickerbocker Fireproofing Co., 250 App. Div. 258; 204 S. B. 472.

For court decisions relative to the employer's or carrier's cause of action against the third party for the amount of payments to the special funds provided by subds. 8 and 9 of § 15, above, see notes under subd. 8. Chapter 87, Laws of 1937, effective March 19, 1937, gives an employer or carrier cause of action against a third party for the amount of the payment into the special fund of § 25-a.

The amendment of L. 1917, ch. 705, making assignment of the cause of action consecutive upon and therefore contingent upon award of compensation, may be read in the light of Sabatino v. Crimmins Construction Co., 102 Misc. 17; 87 S. B. 268; it is interpreted in Godfrey v. Brooklyn Edison Co., 115 Misc. 21; 114 S. B. 134.

Assignment of the cause of action by dependents in case of the injured employee's death is valid without intervention of an administrator or executor: Travelers Ins. Co. v. Padula Co., 224 N. Y. 397; 95 S. B. 279.

Prior to amendment of this § 29 by L. 1935, ch. 328, an assignee of a cause of action under it unconditionally took the entire beneficial interest of the assigning claimant: Tracy v. American Mutual Liability Insurance Co., 266 N. Y. Rep. 536; 185 S. B. 447, 448; Zurich G. A. & L. Ins. Co. v. Childs Co., 253 N. Y. 324; 9 Ind. Bul. 301; Travelers Ins. Co. v. Brass Goods Mfg. Co., 239 N. Y. 273; 140 S. B. 209; Zirpola v. Casselman, 237 N. Y. 367; 123 S. B. 86; Travelers Insurance Co. v. Padula Co., 224 N. Y. 397; 95 S. B. 279. The form of the assignee's complaint is regulated in Royal Indemnity Co. v. White Engineering Corp., 120 Misc. 332; 123 S. B. 79. The assignee is entitled to interest and costs: Casualty Co. of America v. Swett E. L. & P. Co., 209 App. Div. 175; 133 S. B. 208.

As such assignee, a carrier must prosecute through an administrator if next of kin entitled to share damages exist; otherwise may prosecute in its own name: United States Fidelity & Guaranty Co. v. Graham & Norton Co., 254 N. Y. 50; 185 S. B. 383; Streeter v. Graham & Norton Co., 263 N. Y. 39; 185 S. B. 391; Cox v. Seglin-Harrison Construction Co., 265 N. Y. Rep. 596; 185 S. B. 388; Zirpola v. Casselman, 237 N. Y. 367; 123 S. B. 86; Travelers Insurance Co. v. Padula Co., 224 N. Y. 397; 95 S. B. 281. Compare Aetna Life Insurance Co. v. Moses, 287 U. S. 530; 185 S. B. 388.

As such assignee, a carrier may not under § 109 of the Insurance Law maintain an action against the third party's general liability insurance carrier: Royal Indemnity Co. v. Travelers Ins. Co., 244 App. Div. 582; 14 Ind. Bul. 199; aff'd 270 N. Y. 574; nor may it maintain such an action under § 425, subd. 4, independently of § 109 of the Insurance Law when the liability insurer is insolvent: Matter of Concord Casualty & Surety Co., 163 Misc. 596; 16 Ind. Bul. 377.

Death of an injured employee while suit by the subrogated carrier is pending does not divest the carrier of the cause of action: Manufacturers L. Ins. Co. v. Overseas Shipping Co., 130 Misc. 710; 156 S. B. 259.

If a claimant fails to recover from a third party, he may have compensation: McQuillan v. Todd, Robertson, Todd Engineering Corp., 226 App. Div. 838; 8 Ind. Bul. 633; or if he fails to collect judgment: Sharp v. Queensboro Corp., 252 N. Y. Rep. 622; 185 S. B. 264; Lewis v. Maujer Wet Wash Laundry, 35 S. D. R. 616; 217 App. Div. 809; 56 S. B. 62, 276; Sadofsky v. Nouveaute Co., 35 S. D. R. 713; 218 App. Div. 806; 56 S. B. 58, 59, 276.

A carrier for the employer, being also insurer of the third party against public liability must have reduced its expense of medical treatment to a judgment by action under §§ 13 and 29 of the Workmen's Compensation Law if such expense is to be a counterclaim against the amount of its public liability policy: Haberman v. Hartford Accident & Indemnity Co., 230 App. Div. 314; 185 S. B. 458.

A claimant who recovers more from a third party than could be obtained by electing compensation is not entitled to award for medical treatment and care: Gordon v. Elmira, Corning & Waverly R. R. Co., 226 App. Div. 703; 185 S. B. 425.

The Workmen's Compensation Act of Connecticut grants action against third parties to beneficiaries as well as to injured employees: Coleman v. Cating Rope Works, Inc., 247 App. Div. 310; 273 N. Y. Rep. 461; 16 Ind. Bul. 85.

References to court opinions and decisions interpreting this § 29 are in 162 S. B. 164–170, 275, 276; 185 S. B. 576, 577; and 204 S. B. 439–472.

§ 30. **Revenues or benefits from other sources not to affect compensation.** No benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter, except that, in case of the death of an employee of the state, a municipal corporation or any other political subdivision of the state, any benefit payable under a pension system [1]or any other statutory benefit which is not sustained [2]or provided for in whole or in part by the contribution of the employee, may be applied toward the payment of the death benefit provided by this chapter. [*As am'd by L.* 1914, *ch.* 316; *and L.* 1935, *ch.* 384.]

[1] Words "or any other statutory benefit" inserted by L. 1935, ch. 384.
[2] Words "or provided for" inserted by L. 1935, ch. 384.

Compare the notes to Groups 16 and 17 of § 3, Subd. 1, above.

Under authority of this section the Appellate Division affirmed an award for permanent total disability to a chauffeur of the New York City department of sanitation, although compensation plus retirement allowance from a special system exceeded wages prior to accident: Svec v. City of New York, 251 App. Div. 758; 204 S. B. 475.

Award for permanent partial disability for a period subsequent to his voluntary retirement on pension because of twenty-five years of service was affirmed in the case of a municipal employee who had been declared permanently partially disabled in 1933 and thereafter had returned to light work at his regular wage until his retirement in 1938: Pettinato v. City of New York, 259 App. Div. 944; 204 S. B. 297.

Claimant, aged 68 years, an employee of the City of Yonkers and a member of the New York State Employees' Retirement System, sustained accidental loss of an eye in 1926 in the course of his employment. He worked until July, 1927, at which time he was allowed superannuation retirement (Civil Service Law, § 63). Superannuation retirement allowance consists of an annuity which is the actuarial equivalent of a member's accumulated contributions at time of retirement and, in addition to such annuity, a pension payable out of funds provided by the State. The self-insuring employer appealed from a scheduled award made by the State Industrial Board for loss of the eye, contending that § 67 of the Civil Service Law prohibited the payment of both superannuation retirement allowance and workmen's compensation benefits. Held that under §§ 63 and 67 of the Civil Service Law an award of compensation affects only the pensions portion of claimant's retirement allowance and leaves his annuity unimpaired. Matter remitted to the Industrial Board to ascertain the amount to be credited upon the award because of the payment of the pensions portion of the retirement allowance from July 2, 1927 to the end of the period of the award. Dalton v. City of Yonkers, 262 App. Div. 321.

Payments to widow of public employee under the Public Welfare Law (Art. 18, Aid to Dependent Children) do not constitute such a statutory benefit as is contemplated by this section and may not be applied toward the payment of death benefits under the Workmen's Compensation Law: Opinion of Attorney-General, September 27, 1939.

§ 31. **Agreement for contribution by employee void.** No agreement by an employee to pay any portion of the premium paid by his employer to the state insurance fund or to contribute to a benefit fund or department maintained by such employer or to the cost of mutual insurance or other insurance, maintained for or carried for the purpose of providing compensation as herein required, shall be valid, and any employer who makes a deduction for such purpose from the wages or salary of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor.

§ 32. **Waiver agreements void.** No agreement by an employee to waive his right to compensation under this chapter shall be valid.

For withdrawal of a claim and revival of it afterward, compare Joyce v. Eastman Kodak Co., 238 N. Y. 142; 133 S. B. 227; for waiver of a claim in part, Jones v. Republic L. H. & P. Co., 230 App. Div. 745; 185 S. B. 63.

A contract provision by which each party exempts the other from all acts of fault or omission is ineffective: Powley v. Vivian & Co., 169 App. Div. 176; 81 S. B. 73, 74. Compare Crotty v. Pa. R. R. Co., 9 S. D. R. 364.

Lump sum final compromises or settlements between claimants and carriers though approved by the Department of Labor at the time of their making are subject to overthrow: 185 S. B. 518; 161 S. B. 252, 253; 149 S. B. 276, 277.

§ 33. **Assignments; exemptions.** [1]Compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived. Compensation and benefits shall be paid only to employees or their dependents. In case of the death

of an injured employee to whom there was due at the time of his, or her death any compensation under the provisions of this chapter, [2]the amount of such compensation shall be payable to the surviving wife or husband, if there be one, or, if none, to the surviving child or children of the deceased under the age of eighteen years, and if there be no surviving wife or children, then to the dependents of such deceased employee or to any of them as the commission may direct. [3]An award for disability may be made after the death of the injured employee. [*As am'd by L.* 1919, *ch.* 498, *and L.* 1922, *ch.* 615.]

[1] Words "Claims for" stricken out by L. 1922, ch. 615.

[2] Words "not exceeding the sum of two hundred and fifty dollars," stricken out by L. 1922, ch. 615.

[3] Sentence "An award . . . injured employee," inserted by L. 1922, ch. 615.

"Except as provided": see §§ 26 and 29. For a compromise in court see Pelersi v. Ten Eyck Co., 225 App. Div. 833; 185 S. B. 546.

Section 25 regulates payment; § 15, subd. 4, and § 16, subd. 2, permit payment to guardians; §§ 11, 29 and 115 contain provisions relative to personal representatives, guardians and committees; payment may be made to a committee: O'Rourke v. Standard Wood Turning Co., 204 App. Div. 658; 123 S. B. 53.

Relative to release of third parties without carriers' consent, see notes under § 29 above. Administrators having released employers for consideration, the Department of Labor awarded full death benefits: Buell v. N. Y. Central & H. R. R. Co., 6 S. D. R. 361, 377; Conroy v. Mott Haven Towing Line, 193 App. Div. 918; 98 S. B. 48, reversed on admiralty grounds. Compare Jenkins v. Hogan & Sons, 177 App. Div. 41; 87 S. B. 286.

Assignments. Award for nursing services should be made to claimant and not to the person performing services: Holstein v. City of New York, 256 App. Div. 140; 280 N. Y. Rep. 745; 204 S. B. 226.

An employee may not assign to his physician an award for medical treatment: Bloom v. Jaffe, 94 Misc. 222; 81 S. B. 271. Re assignment of fee by attorney, see Opinion of Attorney-General, January 13, 1934.

Exemptions. This section's exemption from creditors protects awards not only before but after payment: Surace v. Danna, 248 N. Y. 18; 156 S. B. 225; also interest on awards: Opinion of Attorney-General, June 4, 1934.

Home purchased with compensation money was held exempt from execution by creditors: Tosti v. Sbano, 170 Misc. 828; 204 S. B. 476.

Real estate purchased with compensation money is not exempt from payment of taxes: Opinion of Attorney-General, December 28, 1938.

Notwithstanding the provisions of this § 33, the Department of Labor should respect court orders directing carriers to pay alimony from compensation: Opinion of Attorney-General, November 25, 1935, re Souders v. Souders, 246 App. Div. 579; 204 S. B. 480, and Hilmantel v. Hilmantel, 157 Misc. 649; 204 S. B. 480.

Part of a claimant's compensation which it deems in excess of the amount reasonably necessary for his rehabilitation and maintenance may be appropriated by the Domestic Relations Court and payment thereof directed to the claimant's wife and children: Opinion of Attorney-General, February 19, 1940.

Payment of awards in case of death. In comparison with § 15, subd. 4, above, the provision of this § 33 relative to death of the injured employee disposes only of compensation due for a disability period preceding the employee's death but not yet paid to him at time of his death: Keenholts v. Bayer Co., 263 N. Y. 77; 185 S. B. 160; Manning v. Stroh & Wilson, Inc., 247 App. Div. 233; 204 S. B. 290; De Santis v. Folcaro, 243 App. Div. 838; 14 Ind. Bul. 84. Payment of such disability compensation is distinct from, and additional to, the regular death benefits. New claim is not requisite; decedent's claim suffices: Hughes v. Trustees of St. Patrick's Cathedral, 245 N. Y. 201; 156 S. B. 192; Sienko v. Bopp & Morgenstern, 248 N. Y. 40; 156 S. B. 271.

Dependents construed. The term "dependents of such deceased employee" means actual dependents of whatever age or whatever relationship to the employee: Manning v. Stroh & Wilson, Inc. 247 App. Div. 233; 204 S. B. 290; Bogold v. Bogold Bros., 218 App. Div. 676; 149 S. B. 172; 245 N. Y. Rep. 574; 156 S. B. 191; Millon v. Ideal Wet Wash Laundry Co., 36 S. D. R. 647; 222 App. Div. 710; 161 S. B. 135; Graham v. Bliss Co., 222 App. Div. 709, and other cases noticed by 185 S. B. 163.

History. Law as of date of accident governs award under the last sentence; therefore award cannot be made if the accident has occurred prior to July 1, 1922, the date upon which L. 1922, ch. 615, adding said last sentence, became effective, though death has occurred subsequent to July 1, 1922: State Treasurer ex rel. Shanaghan, 220 App. Div. 61; 156 S. B. 190, overruling Kovel v. Acorn Mfg. Co., 32 S. D. R. 400. The last sentence offsets Terry v. General Electric Co., 223 N. Y. 120; 114 S. B. 59.

Relative to law prior to July 1, 1922, governing disposition of compensation awarded to an employee prior to his death but not paid to him, see 114 S. B. 58, 59.

§ 34. **Preferences.** Compensation shall [1]be a lien against the assets of the carrier or employer without limit of amount [2]subordinate, however, to claims for unpaid wages [3]and prior recorded liens. [*Section* 34 *am'd by L.* 1916, *ch.* 622, *and L.* 1920, *ch.* 527; *redrafted by L.* 1922, *ch.* 615, *without substantive change; and am'd by L.* 1932, *ch.* 248.]

[1] Words "be a" substituted by L. 1932, ch. 248, for words "have the same preference or."

[2] Words "subordinate, however, to claims" substituted by L. 1932, ch. 248, for words "as is now or may hereafter be allowed by law to the claimant."

[3] Words "and prior recorded liens" substituted by L. 1932, ch. 248, for words "or otherwise."

The provisions of this § 34 do not apply to compensation insured under §§ 106-109-j, below.

The Court of Appeals upheld the constitutionality of this § 34 in Southern Surety Co. of N. Y. (Matter of People), 266 N. Y. Rep. 589, 672; 269 N. Y. Rep. 562; 185 S. B. 363, 364; appeal dismissed, 296 U. S. 544. Upon second appeal, the United States Supreme Court vacated the Court of Appeals' judgment and remanded the cause for further proceedings, 299 U. S. 152; 15 Ind. Bul. 443. In this connection, see notes under subd. 7 of § 54, below.

A lien under this § 34 need not be recorded, docketed or filed to be effective: Albert Pipe Supply Co. v. Callanan, 159 Misc. 547; 204 S. B. 482.

Deceased employee's widow who effected partial settlement with the employer following insurance carrier's insolvency in 1934 was held entitled to dividends in the liquidation proceedings on the full amount of her orginal compensation award, plus interest for delay caused by the liquidator's contest of her claim: Matter of Consolidated Indemnity & Insurance Co. (Re Coron), 255 App. Div. 501; 256 App. Div. 604; 281 N. Y. Rep. 680; 204 S. B. 484.

Claims of injured employees against sum on deposit with superintendent of insurance, carrier having become insolvent, were held not entitled to priority: Matter of People (New York Indemnity Co.), 250 App. Div. 755; 276 N. Y. Rep. 653; 204 S. B. 482.

Awards to the special funds of § 15, Subds. 8 and 9 of the Workmen's Compensation Law were held to be preferred claims against a carrier in liquidation: Matter of People (Lloyds Insurance Co.), 254 App. Div. 344; 281 N. Y. 176; 204 S. B. 319.

As amended by Act of Congress approved June 7, 1934, § 63 of the National Bankruptcy Act makes debts founded upon awards of state workmen's compensation authorities provable in bankruptcy and fixes their priority; as so amended

§ 63 applies to estates pending June 7, 1934, and offsets Lane v. Industrial Commissioner of New York, 54 F. (2d) 338. Since a claim upon an award is provable in bankruptcy, a debt based upon an award or a judgment entered thereon is dischargeable in bankruptcy in the absence of fraud or concealment, or illegal disposition of assets belonging to the bankrupt: Opinions of Attorney-General, September 28, 1936, February 10, 1937, and September 10, 1937. Compare preference of insurance policy premiums, § 130, below, and note thereunder.

Relative to retroactivity of L. 1932, ch. 248, and to preference of workmen's compensation judgments over a deceased employee's funeral expenses and estate administration expenses, see Guarneri Estate, 149 Misc. 760; 185 S. B. 341.

Claims of injured employees against assets of defunct insurance carriers have priority over assessments against such carriers pursuant to § 126 of the Workmen's Compensation Law: Opinion of Attorney-General, February 21, 1934.

Funeral expenses of a fatally injured employee and attorney's liens against awards being "compensation" are liens under this § 34: Opinion of Attorney-General, March 27, 1934.

ARTICLE 3

Occupational Diseases

[*This is former Article 2-A, with sections 42 and 43, relative to physicians' functions and fees, stricken out, section 49-a made subdivision 2 of § 3 and remaining sections renumbered accordingly by L. 1922, ch. 615. Article 2-A was inserted by L. 1920, ch. 538. For list of occupational diseases, see § 3, subd. 2 above, pages 87–92.*]

Section 37. Definitions.
38. Disablement treated as accident.
39. Right to compensation.
40. Time limit.
41. Examining physicians.
42. Date of disablement.
43. Workmen, when not entitled.
44. Liability of employer.
45. Notice of employers.
46. Information; penalty.
47. Presumption as to cause of disease.
48. Diseases which are accidents.

§ 37. **Definitions.** Whenever used in this article: 1. "Disability" means the state of being disabled from earning full wages at the work at which the employee was last employed.

2. "Disablement" means the act of becoming so disabled as defined in subdivision one.

§ 38. **Disablement treated as accident.** The disablement of an employee resulting from an occupational disease described in [1]subdivision two of section three shall be treated as the happening of an accident within the meaning of this chapter and the procedure and practice provided in this chapter shall apply to all proceedings under this article, except where specifically otherwise provided herein [*As am'd by L. 1922, ch. 615.*]

[1] Words "subdivision two of section three" substituted for words "section forty-nine-a of this article, except where specifically otherwise provided," by L. 1922, ch. 615.

Compare § 2, subd. 7.

Disablement from Dupuytren's contraction necessitating change to different work was treated as the happening of an accident: Soukup v. Friedman Marble & Slate Works, 255 App. Div. 249; 204 S. B. 199.

Claimant who contracted dermatitis in May, 1939, continued at work until October, 1939, when he was forced to quit on account of the disease. Meanwhile, in September, 1939, the employer transferred its workmen's compensation insurance to a different carrier. The Industrial Board awarded compensation to claimant against the latter carrier. Upon appeal, this carrier contended that the award should have been charged against the carrier who insured the employer at the time the disease was contracted. Award against second carrier affirmed. Lanzetta v. Allied Decorating Co., Inc., 261 App. Div. 861.

§ 39. **Right to compensation.** If an employee is disabled or dies and his disability or death is caused by one of the diseases mentioned in [1]subdivision two of section three, and the disease is due to the nature of the corresponding employment as described in [2]such subdivision in which such employee was engaged and was contracted therein, he or his dependents shall be entitled to compensation for his death or for the duration of his disablement in accordance with the provisions of article two, except as hereinafter stated; provided, however, that if it shall be determined that such employee is able to earn wages at another occupation which shall be neither unhealthful nor injurious, and such wages do not equal his full wages prior to the date of his disablement, the compensation payable shall be a percentage of full compensation proportionate to the reduction in his earning capacity. [*As am'd by L.* 1922, *ch.* 615.]

[1] Words "subdivision two of section three," substituted for words "section forty-nine-a of this article," by L. 1922, ch. 615.

[2] Words "such subdivision" substituted for words "section forty-nine-a" by L. 1922, ch. 615.

Compare § 15, subd. 3, par. "v", subds. 5 and 6, above.

Reduced earnings awards were affirmed in the following cases:

Scrub woman who contracted dermatitis and her dormant diseased condition prevented her from working with water and soap, use of which would have caused an activation: McConnell v. City of New York, 255 App. Div. 730; 204 S. B. 490. See also Newman v. American Locomotive Co., 255 App. Div. 733; 204 S. B. 490.

Lead smelter who contracted lead poisoning and whose susceptibility to the disease prevented him from working with or coming in contact with lead or its preparations: Sullivan v. Rochester Smelting & Refining Co., 252 App. Div. 712; 277 N. Y. Rep. 638; 204 S. B. 491.

Minimum reduced earnings rate. Claimant who became disabled as the result of an occupational disease recovered but was unable to return to her former occupation because it was injurious to her. She entered a new occupation but was unable to earn as much as she formerly had earned in her previous occupation. The Industrial Board, having ascertained that her reduced earnings rate would be $7.45 per week under this section awarded compensation to her at the $8 weekly minimum prescribed by § 15, subd. 6. Held that the Board erred in applying the $8 minimum rate since under this § 39 cases of impaired earning capacity due to occupational disease are excepted from the minimum compensation provision of the law. Spang v. Moser Studio, Inc., 262 App. Div. 319, July 2, 1941.

§ 40. **Time limit.** Neither the employee nor his dependents shall be entitled to compensation for disability or death resulting from disease unless the disease is due to the nature of his employment and contracted therein, [1]or in a continuous employment similar to the one in which he was engaged at the time of his disablement, within the twelve months previous to the date of disablement, whether under one or more employers. [2]The time limit for contraction of the disease prescribed by this section shall not bar compensation in the case of an employee who contracted the disease in the same employment with the same employer by whom he was employed at the time of his disablement and who had continued in the same employment with the same employer from the time of contracting the disease up to the time of his disablement thereby. [*As am'd by L.* 1928, *ch.* 754; *and L.* 1931, *ch.* 344, *effective July* 1, 1931.]

[1] Words "or in a . . . his disablement" inserted by L. 1928, ch. 754.
[2] Remainder of section added by L. 1931, ch. 344.

Date of disablement is determined under § 42, below. Questions of the meaning of "contracted" and of presumption as to contraction within a year are raised in the lead poisoning cases, Daley v. Miner Lithographing Co., 236 App. Div. 549; 262 N. Y. Rep. 542; 188 S. B. 42; Menz v. Schupp & Sons, 241 App. Div. 635; 188 S. B. 44, and the benzol poisoning case, Haglund v. Bayer Co., 243 App. Div. 840; 188 S. B. 45; other lead poisoning cases turning upon contraction within a year are in 161 S. B. 50, 51; later cases are Sussman v. Silberschultz, 225 App. Div. 837; 177 S. B. 64; Jansak v. Dragon Paper Mfg. Co., 227 App. Div. 681; 177 S. B. 64; Rosenberg v. Ideal Metal Co., 230 App. Div. 797; 177 S. B. 66; Macin v. Harvard Auto Body Co., 231 App. Div. 775; 10 Ind. Bul. 64; 236 App. Div. 770; 11 Ind. Bul. 389; Spencer v. Merchants Despatch Co., 235 App. Div. 646; 11 Ind. Bul. 162; Sears v. Seneca Battery Corp., 238 App. Div. 751; 12 Ind. Bul. 51; Allcroft v. Harkavy, 239 App. Div. 863; 12 Ind. Bul. 136; Green v. Panzardi, 242 App. Div. 742; 13 Ind. Bul. 250. In Crowley v. Yonkers Herald Publishing Co., 250 App. Div. 670; 275 N. Y. Rep. 571; 204 S. B. 493, claim was denied as lead posoning was contracted more than five years prior to date of disablement as fixed by the Industrial Board. This article does not apply when disease has been contracted previous to May 5, 1920: L. 1920, ch. 538, § 2. Question of contraction prior to such date figured in Lynch v. Gair Co., 204 App. Div. 850; 118 S. B. 144.

§ 41. [1]**Examining physicians.** The industrial commissioner shall appoint one or more physicians whose duty it shall be to examine any claimant under this article and to make a report in such form as the commissioner may require. [*As redrafted by L.* 1922, *ch.* 615.]

[1] Word "Examining" substituted for word "Certifying" by L. 1922, ch. 615.

Laws of 1922, ch. 615, thoroughly revised this § 41 and repealed former cognate §§ 42 and 43. Regularly employed physicians of the Department of Labor perform the duties of this section and § 19, above. See § 13, subd. (d), § 13-a, subd. (4), §§ 19, 19-a, above, and § 71, below.

§ 42. **Date of disablement.** [1]For the purposes of this article the date of disablement shall be such date as the board may determine on the hearing on the claim. [*Former* § 44, *renumbered* § 42 *and am'd by L.* 1922, *ch.* 615.]

[1] Amendment of this section by L. 1922, ch. 615, substitutes a single method of determining the date for five former methods.

Disablement from Dupuytren's contraction necessitating change to different work was treated as the happening of an accident: Soukup v. Friedman Marble & Slate Works, 255 App. Div. 249; 204 S. B. 199.

A painter who contracted dermatitis in May, 1939, continued at work until October, 1939, when he was forced to quit on account of the disease. Meanwhile, in September, 1939, the employer transferred its workmen's compensation insurance to a different carrier. The Industrial Board awarded compensation to claimant against the latter carrier. Upon appeal, this carrier contended that the award should have been charged against the carrier who insured the employer at the time the disease was contracted. Award against the second carrier was affirmed: Lanzetta v. Allied Decorating Co., Inc., 261 App. Div. 861.

§ 43. **Workmen, when not entitled.** If an employee, at the time of his employment, wilfully and falsely represents in writing that he has not previously suffered from the disease which is the cause of disability or death, no compensation shall be payable. [*Former* § 45, *renumbered* § 43 *by L.* 1922, *ch.* 615.]

Compare §§ 46, 114.

§ 44. **Liability of employer.** The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If, however, such disease was contracted while such employee was in the employment of a prior employer, the employer who is made liable for the total compensation as provided by this section, may appeal to the [1]board for an apportionment of such compensation among the several employers who since the contraction of such disease shall have employed such employee in the employment to the nature of which the disease was due. Such apportionment shall be proportioned to the time such employee was employed in the service of such employers, and shall be determined only after a hearing, notice of the time and place of which shall have been given to every employer alleged to be liable for any portion of such compensation. If the board find that any portion of such compensation is payable by an employer prior to the employer who is made liable to the total compensation as provided by this section, it shall make an award accordingly in favor of the last employer, and such award may be enforced in the same manner as an award for compensation. [*Former* § 46, *renumbered* § 44 *and am'd by L.* 1922, *ch.* 615.]

[1] Word "board" substituted for word "commission" by L. 1922, ch. 615.
See cases interpreting the term "contracted," note to § 40, above.

Apportionment. Where claimant suffered Dupuytren's contraction and continued at different work for a while, carrier at time of the contraction and not carrier at final cessation of work was held liable for compensation: Soukup v. Friedman Marble & Slate Works, 255 App. Div. 249; 204 S. B. 199. Compare Lanzetta v. Allied Decorating Co., Inc., 261 App. Div. 861.

Carrier on risk at time of claimant's first attack of lead poisoning was held liable for 50 per cent of an award covering disability from a recurrent attack in

the same employ a year later: Mazorek v. Rochester Smelting & Refining Co., 254 App. Div. 786; 204 S. B. 496.

Later carrier was held wholly liable for second attack of lead poisoning even though claimant had been disabled from the same disease four years earlier while in the same employ and had received compensation therefor: Hajek v. Burling Brown, 255 App. Div. 729; 204 S. B. 495.

The Appellate Division upheld refusal of the Board to apportion award between two or more successive carriers of a single employer: Strauss v. Waldenberg, 240 App. Div. 795; 185 S. B. 328.

Liability of last employer. Where an employee in September, 1931, contracted an occupational disease in the course of his employment and thereafter became a partner in another firm, so that at time of his disablement in June, 1932, and death in January, 1933, from such disease he was employed by no one, an award was properly made against the employer for which he worked at the time he contracted the disease and its insurance carrier: Baker v. Nu-Art Advertising Co., ex rel., 244 App. Div. 386; 271 N. Y. 112; 204 S. B. 497.

§ 45. **Notice to employers.** The employer to whom notice of death or disability is to be given, or against whom claim is to be made by the employee, shall be the employer who last employed the employee during the said twelve months in the employment to the nature of which the disease was due [1]and such notice and claim shall be deemed seasonable as against prior employers. [2]The requirements as to notice as to occupational disease and death resulting therefrom shall be the same as required in section eighteen of this chapter, except that the notice shall be given to the commissioner and the employer within ninety days after the disablement. [*Former* § 47, *renumbered* § 45 *by L.* 1922, *ch.* 615; *am'd by L.* 1928, *ch.* 754.]

[1] Words "and in which it was contracted" stricken out by L. 1928, ch. 754.
[2] Remainder of section added by L. 1928, ch. 754.

Compare § 18.

Notice of disablement within ninety days thereafter is prerequisite to award of death benefits in case the employee dies of the disease; notice only of death does not suffice: Whitmyre v. International Business Machines Corp., 267 N. Y. 28; 185 S. B. 489. Thereafter the Industrial Board renewed the award with findings excusing the failure to give written notice and the Appellate Division and the Court of Appeals successively affirmed the award in 249 App. Div. 678 and 274 N. Y. 61; 204 S. B. 351.

For failures to give notice in lead poisoning cases occurring prior to 1928, see Macin v. Harvard Auto Body Co., 231 App. Div. 775; 10 Ind. Bul. 64; and Rosawitz v. Ficks Reed Co., 226 App. Div. 710; 8 Ind. Bul. 579; award for later disability and death benefits affirmed, 247 App. Div. 918; 272 N. Y. Rep. 654; 15 Ind. Bul. 445.

§ 46. **Information; penalty.** The employee or his dependents, if so requested, shall furnish the last employer or the [1]board with such information as to the names and addresses of all his other employers during the said twelve months, as he or they may possess; and if such information is not furnished, or is not sufficient to enable such last employer to take proceedings against a prior employer under section [2]forty-four, unless it be established that the disease actually was contracted while the employee was in his

employment, such last employer shall not be liable to pay compensation, or, if such information is not furnished or is not sufficient to enable such last employer to take proceedings against other employers under section [2]forty-four, such last employer shall be liable only for such part of the total compensation as under the particular circumstances the [1]board may deem just; but a false statement in the information furnished as aforesaid shall not impair the workman's rights unless the last employer is prejudiced thereby. [*Former* § 48, *renumbered* § 46 *and am'd by L.* 1922, *ch.* 615.]

[1] Word "board" substituted for word "commission" by L. 1922, ch. 615.
[2] Word "forty-four" substituted for word "forty-six" by L. 1922, ch. 615.

§ 47. **Presumption as to the cause of disease.** If the employee, at or immediately before the date of disablement, was employed in any process mentioned in the second column of the schedule of diseases in [1]subdivision two of section three, and his disease is the disease in the first column of such schedule set opposite the description of the process, the disease presumptively shall be deemed to have been due to the nature of that employment. [*Former* § 49, *renumbered* § 47 *and am'd by L.* 1922, *ch.* 615.]

[1] Words "subdivision two of section three," substituted for words "section forty-nine-a," by L. 1922, ch. 615.

For a hernia compensated as an occupational disease, see Foster v. Gillinder Bros. Inc., 278 N. Y. 348; 204 S. B. 201.

Compare § 21.

§ 48. **Diseases which are accidents.** Nothing in this article shall affect the rights of an employee to recover compensation in respect to a disease to which this article does not apply if the disease is an accidental personal injury within the meaning of subdivision seven of section [1]two of this chapter. [*Former* § 49-b, *renumbered* § 48 *and am'd by L.* 1922, *ch.* 615.]

[1] Word "two" substituted for word "three" by L. 1922, ch. 615.

ARTICLE 4

Security for Compensation

[*Former Article* 3 *renumbered Article* 4 *and three new sections added thereto by L.* 1922, *ch.* 615.]

Section 50. Security for payment of compensation.
51. Posting of notice regarding compensation.
52. Effect of failure to secure compensation.
53. Release from all liability.
54. The insurance contract.
54-a. Security where coverage is in issue.
54-b. [Failure of carrier or self-insurer to pay award; enforcement proceedings.]
55. Acceptance of premium by carrier an estoppel.
56. Subcontractors.
57. Restriction on issue of permits unless compensation is secured.

§ 50. **Security for payment of compensation.** An employer shall secure compensation to his employees in one of the following ways:

An employer cannot secure compensation to part of his or its employees in one way and compensation to the rest in another way: Opinions of Attorney-General, June 29, 1933, and January 3, 1934.

1. **By insuring and keeping** insured the payment of such compensation in the state fund, or

See special provisions governing the state fund, §§ 76–99, below; see Annual Reports of Industrial Commissioner for its activities.

2. **By insuring and keeping** insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state.[1] [*Subd.* 2 *am'd by L.* 1916, *ch.* 622; *and L.* 1922, *ch.* 615.]

[1] Sentence "If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it a notice specifying the name of such insurance corporation or mutual association and such information regarding the policies as the commission may require," stricken out by L. 1922, ch. 615. Compare amendment of § 51 below.

Only such corporations or individuals as are authorized by certificate of the New York State Superintendent of Insurance may transact the business of insurance in New York. For regulations governing workmen's compensation insurance, see Insurance Law and Workmen's Compensation Law, § 54, below. Under supervision of the Insurance Department mutual employers' liability and workmen's compensation corporations may group industries for dividend purposes: Opinion of Attorney-General, March 8, 1933. Neither a surety company bond nor an ordinary life policy is acceptable for workmen's compensation insurance: Opinions of Attorney-General, July 13, 1932, and April 27, 1933.

3. **By furnishing satisfactory proof to** the [1]commissioner of his financial ability to pay such compensation for himself, in which case the commissioner [2]shall [3]require the deposit with the commissioner of [4]such securities [5]as the commissioner may deem necessary of the kind prescribed in [6]subdivisions one, two, three, four and five, and paragraph a of subdivision seven of section two hundred and thirty-nine of the banking law, in an amount to be determined by the [1]commissioner, to secure his liability to pay the compensation provided in this chapter. The [1]commissioner may also require an agreement on the part of an employer to pay any awards commuted under section twenty-seven of this [7]chapter, into the special fund of the state fund, as a condition of his being allowed to remain uninsured pursuant to this section. The [1]commissioner shall have the authority [8]to deny the application of an employer to pay such compensation for himself or to revoke [9]his consent furnished, under this section at any time, for good cause shown. [10]The employer [11]qualifying under this subdivision shall be known as a self-insurer.

[12]If for any reason the status of an employer under this subdivision is terminated, the security bond deposit referred to herein shall remain in the custody of the industrial commissioner for a period of at least twenty-six months. At the expiration of such time or such further time period as the commissioner may deem proper and warranted under the circumstances, and so designates, the commissioner may accept in lieu thereof, and for the additional purpose of securing such further and future contingent liability as may arise from prior injuries to workers and be incurred by reason of any change in condition of such workers warranting the industrial board making subsequent awards for payment of additional compensation, a policy of insurance furnished by the employer, his heirs or assigns or others carrying on or liquidating such business. Such policy shall be in a form approved by the superintendent of insurance and issued by [13]the state fund or any insurance company licensed to issue this class of insurance in this state. It shall only be issued for a single complete premium payment in advance by the employer. It shall be given in an amount to be determined by the industrial commissioner and when issued shall be non-cancellable for any cause during the continuance of the liability secured and so covered. [*Subd.* 3 *am'd by L.* 1916, *ch.* 622; *L.* 1917, *ch.* 705; *L.* 1922, *ch.* 615; *L.* 1930, *ch.* 184; *L.* 1932, *ch.* 488; *and L.* 1935, *ch.* 329.]

[1] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.
[2] Word "shall" substituted for word "may" by L. 1930, ch. 184.
[3] Words "in his discretion" substituted for words "in its discretion" by L. 1922, ch. 615, and stricken out by L. 1930, ch. 184.
[4] Word "such" inserted by L. 1930, ch. 184.
[5] Words "as the commissioner may deem necessary" inserted by L. 1930, ch. 184.
[6] Words "subdivisions one, two, three, four and five, and paragraph a of subdivision seven of section two hundred and thirty-nine of the banking" substituted for words "section thirteen of the insurance" by L. 1922, ch. 615.
[7] Word "chapter" substituted for word "act" by L. 1922, ch. 615.
[8] Words "to deny . . . himself or" inserted by L. 1930, ch. 184.
[9] Word "his" substituted for word "its" by L. 1922, ch. 615.
[10] Following sentence added by L. 1922, ch. 615.
[11] Words "qualifying under this subdivision" substituted for words "so electing" by L. 1930, ch. 184.
[12] Rest of subdivision added by L. 1932, ch. 488, and am'd by L. 1935, ch. 329.
[13] Words "the state fund or" inserted by L. 1935, ch. 329.

Subdivision 5 of this section, establishing the division of self-insurance, should be read in connection with this subd. 3.

The State Banking Department issues a "List of Securities Considered Legal Investments for Savings Banks".

The Department of Labor issues "Rules Governing Self-Insurers."

A trustee in bankruptcy cannot reach securities deposited with the commissioner: Opinion of Attorney-General, January 6, 1922; a self-insurer's right to assign such securities is entirely subordinate to the commissioner's rights: Id., January 26, 1933; they are not subject to attachment: Halpert v. Schultz & Son, N. Y. Law Journal, May 4, 1933, page 2690. Relative to consolidated deposit of securities by several associated companies, see Opinions of Attorney-General, February 2, 1933, December 26, 1933, and March 6, 1934; relative to distribution of the proceeds from sale of securities when they are insufficient to meet all liabilities: Id., August 29, 1933; relative to proof prerequisite to record-

ing transfer of securities from one self-insurer to another: Id., January 11, 1934; relative to medical expenses as a charge against securities of a bankrupt self-insurer: Id., March 12, 1934; relative to Commissioner's Rule 8 as to proof of financial ability and acceptance of report of financial ability from a parent-entity not operating in New York State: Id., May 13, 1936; relative to requirement of surety bond in event of assignment of deposited securities: Id., October 14, 1936; relative to application for self-insurance of a partnership purporting to include a corporation: Id., April 15, 1937. The Attorney-General's opinions interpreting the Workmen's Compensation Law are appended to the Annual Reports of the Industrial Commissioner.

In revoking an order of the Commission cancelling a self-insurer's privilege under this subdivision, the Appellate Division has interpreted the phrase "for good cause shown": State Industrial Comn. v. Yonkers R. R. Co., No. 2, 186 App. Div. 192; 95 S. B. 242; compare New York Central R. R. v. White, 243 U. S. 188; 87 S. B. 21, 22.

Prior to amendment of this subd. 3 by L. 1935, ch. 329, the Attorney-General had held that the State Insurance Fund, not being licensed, could not issue a release policy: Opinion of Attorney-General, December 19, 1932.

Reinsurance policy obtained by self-insurer is not the security contemplated in this Subdivision: Opinion of Attorney-General, August 9, 1938.

3-a. **The board of supervisors of a** county, by resolution, may adopt the plan, provided by this subdivision, for mutual self-insurance on the assessment plan of the county, and of such of the cities, villages and towns therein as by resolution of their governing board elect to participate, for the payment of compensation under this chapter to the employees of the county and of the several participating municipal corporations, [1]including volunteer firemen to the limits as fixed by section two hundred and five of the general municipal law. The chairman of the board of supervisors shall appoint a committee to manage the plan and the treasurer of the county shall be custodian of all moneys collected under this subdivision. When an award of compensation has been made under this chapter to an employee of the county or of a city, village or town that has joined in such plan of mutual insurance, such award shall be deemed a joint liability of the participating municipalities and shall be apportioned to each in the proportion that its equalized valuation bears to the aggregate valuation of all the participating municipal corporations. In the case of a participating village, its equalized valuation for such purpose shall be deemed the total of the valuation fixed by the last preceding annual village assessment roll. [10]The expenses of medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus necessitated by the injury of an employee, for such period as the nature of the injury or the process of recovery may require, as provided under this chapter, shall be apportioned in like manner. The expense incurred by the committee in administering the plan and any interest paid by it, as hereinafter provided, shall be apportioned in like manner. The amounts so apportioned shall be a county, city, town or village charge, as the case may be. The committee in charge of the plan shall certify to the clerk of the board of supervisors all such amounts apportioned to the county, or to a city or town, and the

same shall be included by the board of supervisors in the next succeeding tax levy, and when collected shall be paid over to the county treasurer and by him held subject to the order of the committee to pay the awards on account of which such amounts were apportioned or to discharge any obligation incurred by it for such purpose. The committee shall also transmit to the clerk of each participating village the amount apportioned by it to such village, and such amount when levied and collected by the village shall be paid over by the treasurer or other fiscal officer to the county treasurer for the purposes of this subdivision. When an award shall have been made under this chapter to an employee of the county or of a participating municipal corporation, upon the order of the committee, [2]the board of supervisors may appropriate the necessary moneys from county funds or authorize the county treasurer [3]to borrow sufficient money to pay such award in anticipation of the collection of the assessments on the county and the several participating municipal corporations, as authorized by this subdivision, and [4]to pledge [5]assessments for the repayment of such loan, together with the interest thereon. If such award be not payable in a lump sum, [6]moneys [7]borrowed, [8]if any, and moneys collected and not immediately applied to the purposes of this subdivision, shall be deposited by the county treasurer in a bank or trust company to the credit of the workmen's compensation fund. All interest received [11]on account of such deposit shall be a part of such fund. If any participating city or village be located in two counties, such city or village [9]may elect with which county it will carry its insurance. [*Subd.* 3-a *added by L.* 1923, *ch.* 567; *am'd by L.* 1927, *ch.* 494; *L.* 1931, *ch.* 199; *L.* 1932, *ch.* 202; *L.* 1939, *ch.* 533.]

[1] Words "including . . . municipal law" inserted by L. 1932, ch. 202.
[2] Words "the board . . . or authorize" inserted by L. 1931, ch. 199.
[3] Word "to" substituted for words "may at once" by L. 1931, ch. 199.
[4] Word "to" substituted for word "may" by L. 1931, ch. 199.
[5] Word "such" stricken out by L. 1932, ch. 202.
[6] Word "the" stricken out by L. 1931, ch. 199.
[7] Word "so" stricken out by L. 1931, ch. 199.
[8] Words "if any" inserted by L. 1931, ch. 199.
[9] Words "may elect with which county it will carry its insurance" substituted by L. 1927, ch. 494, for words "shall be deemed a participant only to the extent that the equalized valuation of that portion of such city or village within the county bears to the whole valuation of such city or village, and the participating municipal corporations shall be chargeable only with a like proportion of an award due under this chapter to an employee of such city or village."
[10] Sentence "The expenses . . . in like manner" inserted by L. 1939, ch. 533.
[11] Word "on" substituted for word "an" by L. 1939, ch. 533.

The division of self-insurance provided by subd. 5, below, administers all matters relating to self-insurance under this subd. 3-a.

The Workmen's Compensation Law covers only such municipal employees as are engaged in the employments enumerated in groups 1–15 and 19 of subd. 1 of § 3, above.

Municipal contracts for public works must contain the stipulation for workmen's compensation insurance required by the General Municipal Law, § 90, and the State Finance Law, § 142.

All counties, cities, villages and towns not insured under subds. 1 or 2 of this section are liable for the expense of administering the Workmen's Compensation Law, pro rata, under § 126, below.

Towns pay the cost of compensation out of general funds but may charge such cost for highway workers to "miscellaneous purposes" under the Highway Law, § 141 (formerly § 90), subd. 4: Opinion of Attorney-General, January 25, 1934; see also Ruling of Comptroller, 42 S. D. R. 334.

Concerning the power of the managing committee provided by this subd. 3-a to prescribe conditions of admission to, and to reject applications of municipalities for membership in, the plan, see Opinion of Attorney-General, June 29, 1933; concerning its authority to incur and control expenses, Id., March 23, 1936. Under this plan medical expense has to be absorbed by each unit; it is not in the category of awards subject to apportionment: Opinion of Attorney-General, June 25, 1937.

The term "equalized valuation" is such value as is fixed by the Board of Assessors pursuant to § 50, Article 3 of the Tax Law and in uniformity with the rule therein set forth: Opinion of Attorney-General, December 12, 1936.

Withdrawal from this plan must be with consent of the Board of Supervisors and each participating unit by duly adopted resolutions with provision for adjustments: Opinions of Attorney-General, March 1, 1937 and July 19, 1937.

School district may not qualify as self-insurer pursuant to this Subdivision: Opinon of Attorney-General, March 7, 1938.

Award to elective superintendent of highways against self-insuring town, member of mutual insurance plan, was affirmed where latter consented to bring him within this law: Clemens v. Town of Osceola, 257 App. Div. 884; 204 S. B. 189.

3-b. **No person, firm or corporation,** other than an attorney and counsellor-at-law, shall solicit the business of representing, or engage in representing self-insurers, as defined in subdivision three of this section, before the board or any officer, agent or employee of the department assigned to conduct any hearing, investigation or inquiry relative to a claim for compensation or benefits under this chapter, unless he shall be a citizen of the United States, or a corporation organized under the laws of the state of New York, and shall have obtained from the commissioner a license authorizing him to appear in matters or proceedings before the department. Such license shall be issued by the commissioner upon the recommendation of the board, and in accordance with the rules established by the board.

The board, in its rules, may provide for the issuance of licenses to persons, firms or corporations, upon such proof of character and fitness as it may deem necessary, and may provide for a license fee in an amount not exceeding one hundred dollars a year, and for the giving of a bond running to the people of the state of New York, conditioned upon the faithful performance of all duties required of such person, firm or corporation, and in an amount to be fixed by the board in its rules. Such bond shall be approved by the commissioner as to form and sufficiency and shall be filed with the commissioner. [1]All license fees collected under the provisions of this section shall be paid into the special fund created pursuant to subdivision eight of section fifteen hereof.

There shall be maintained in each office of the department a registry or list of all persons to whom licenses have been issued, as provided herein, which list shall be corrected as often as licenses

are issued or revoked. Absence of record of the license issued, as herein provided, shall be prima facie evidence that a person, firm or corporation is not licensed to represent self-insurers.

Any such license may be revoked by the commissioner, for cause, and on the recommendation of the board, after a hearing before such board, shall be revoked by the commissioner.

No license shall be issued hereunder for a period longer than one year from the date of its issuance. The provisions of this section shall not apply to a regular employee of a self-insured employer. [*Subd.* 3-b *added by L.* 1928, *ch.* 584; *am'd by L.* 1930, *ch.* 521.]

[1] Sentence "All license . . . fifteen hereof" inserted by L. 1930, ch. 521.

Compare corresponding provisions regulating representation of claimants, § 24-a, above. Rule 21 governing licenses under this subdivision appears in the Appendix below. It requires a fee of $50 and a bond of $1,000.

3-c. **Notwithstanding any provision in this chapter** or in any general, special or local law contained, all cash and securities deposited with the industrial commissioner by an employer who is a party or a wholly owned subsidiary of a party to a plan heretofore or hereafter adopted under article seven of the public service law by the transit commission—metropolitan division of the department of public service, and who is, or at the time of the consummation of such plan was, a self-insurer under this chapter, may be withdrawn upon, or at any time after, the consummation of such plan as hereinafter provided. All cash and securities deposited by any such employer with and held by the industrial commissioner may be withdrawn upon, or at any time after the consummation of such plan where any city which is a party thereto and which is a self-insurer under this chapter assumes all liabilities of or claims against such employer under this chapter, as follows: (a), where such plan provides that such city shall acquire, or that such employer or his assigns shall retain, all the right and interest of such employer in the deposited cash and securities, the industrial commissioner shall surrender and deliver such cash and securities to such city or to such employer or his assigns, as the case may be, upon its demand, and (b), where such plan provides that such city and such employer, or his assigns, shall each retain some right and interest in such cash and securities, the industrial commissioner shall surrender and deliver such cash and securities to such city and to such employer or his assigns upon their joint demand as shall be specified therein. [*Subd.* 3-c, *added by L.* 1941, *ch.* 619.]

4. [1]a. **A county, city, village, town or other** political subdivision of the state may secure compensation to its employees in accordance with subdivision one or subdivision two* of this section. If it does not do so, such county, city, town, village or other political subdivision shall be deemed to have elected to secure compensa-

* Subd. 3-a, providing a mutual self insurance plan, was added in 1923.

tion pursuant to subdivision three of this section. Such a county, city, town, village or other political subdivision shall not be required to furnish proof of financial ability or to make deposit of securities in compliance with such subdivision, but shall be obliged to meet all other requirements prescribed by this chapter for employers so electing. Such county, city, town, village or other political subdivision shall file with the commissioner notice of such election.

b. Whenever compensation is awarded to a claimant for injury to an employee of a self-insuring county, town or political subdivision, other than a city or a village, the treasurer of the county employing such employee, or containing the town or other political subdivision that employs him, shall, upon presentation of the award, forthwith begin payment of it in accordance with this chapter, using any money of the county available therefor. If none is available, he shall by temporary loan upon the credit of the county immediately borrow sufficient money to meet compensation payments that will fall due prior to collection of the next tax levy. The board of supervisors shall thereupon levy upon the taxable property of the county, if for injury to a county employee, and of the particular town or other political subdivision, if for injury to an employee of such town or other political subdivision, a sum sufficient to enable the treasurer to repay such loan and to continue compensation payments according to the requirements of the case.

c. Whenever compensation is awarded to a claimant for injury to an employee of a self-insuring city or village, the treasurer of the city or village shall, upon presentation of the award forthwith begin payment of it in accordance with this chapter, using any money of the city or village available therefor. If none is available, he shall by temporary loan upon the credit of the city or village immediately borrow sufficient money to meet compensation payments that will fall due prior to such time as the city or village may appropriate for the purpose. The city or village shall thereupon appropriate a sum sufficient to enable the treasurer to repay such loan and to continue compensation payments according to the requirements of the case.[2] [*Subd.* 4 *added by L.* 1919, *ch.* 458; *am'd by L.* 1922, *ch.* 615.]

[1] As am'd by L. 1922, ch. 615, this subdivision is a substitute for former § 35 and former subdivision 4 of § 50, added by L. 1918, ch. 458. By contrast with the former requirements, a political subdivision of the State is automatically a self-insurer if not insured with the state fund or a private insurance corporation and a city or village pays compensation to its injured employees without intervention of the county treasurer. Not all municipal employees are covered by the law: § 3, subd. 1, Group 17, above. But see Group 19 as amended by L. 1941, ch. 875.

[2] Concluding paragraphs of § 50 imposing a penalty for failure to comply with its provisions and empowering the commission to remit such penalty, as amended by L. 1914, ch. 316, stricken out by L. 1922, ch. 615. Compare § 52.

The division of self-insurance provided by subd. 5, below, administers all matters relating to self-insurance under this subd. 4.

The Workmen's Compensation Law covers only such municipal employees as are engaged in the employments enumerated in Groups 1–15 and 19 of subd. 1 of § 3, above.

A school district is a "political subdivision" within the meaning of this subd. 4: Opinions of Attorney-General, October 17 and 27, 1933; also the Port of New York Authority, Id., June 20, 1935; but a municipal board or department is not. The Buffalo and Fort Erie Public Bridge Authority is a "political subdivision" in relation to subd. 2-d of the Tax Law: Opinion of Attorney-General, May 31, 1934, cited in above opinion of June 20, 1935.

A municipality cannot contract under subd. 1 or subd. 2 of this section for coverage of but part of its employees; it must insure all or none: Letter of Attorney-General, June 15, 1926; nor insure part of its employees under one subdivision of this § 50 and part under another: Id., December 4, 1933.

Contracts for public works must contain the stipulation for workmen's compensation insurance required by the General Municipal Law, § 90, and the State Finance Law, § 142.

All counties, cities, villages and towns not insured under subds. 1 or 2 of this section are liable for the expenses of adminstering the Workmen's Compensation Law, pro rata, under § 126, below.

Towns pay the cost of compensation out of general funds but may charge such cost for highway workers to "miscellaneous purposes" under the Highway Law, § 141 (formerly § 90), subd. 4: Opinion of Attorney-General, January 25, 1934; see also Ruling of Comptroller, 42 S. D. R. 334.

This subdivision is retroactive as to "other political subdivisions," e.g., school districts: Bailey v. School District No. 5, 204 App. Div. 125; 118 S. B. 51.

A school district may qualify as a self-insurer pursuant to this Subdivision: Opinion of Attorney-General, March 7, 1938.

5. **Division of self-insurance.** There may be a division of self-insurance. Such division, under the direction of the commissioner, shall administer all matters relating to self-insurance under subdivision* three, three-a, and four of this section.

The division of self-insurance shall assign each self-insurer, qualified under section fifty, of this chapter, to one of the following groups: (1) manufacturing and trade, including mining and quarrying; (2) transportation, public utilities, and construction; (3) political subdivisions; (4) miscellaneous.

"Self-insurance," as used herein, shall be deemed to be the system of securing compensation as provided in subdivisions three, three-a and four of section fifty of this chapter.

Advisory committee for self-insurance. To advise the commissioner and director of the self-insurance division, there shall be an advisory committee for self-insurance, which shall consist of seven members appointed by the commissioner. Three of such members shall be named from the manufacturing and trade group of self-insurance, three from the transportation, public utilities and construction group, and one member shall be a self-insurer selected at large by the commissioner, who shall be vice-chairman of the advisory committee. The commissioner shall be an additional member of the advisory committee and act as chairman thereof; the director of the division of self-insurance shall act as

* So in original Chapter 108 of 1937; evidently should be "subdivisions."

secretary of the advisory committee. Any member appointed to such advisory committee shall be an employer or an officer of an employer who is self-insured. The terms of the members of the advisory committee shall be three years except that of those first appointed, the terms of three shall expire on June thirtieth, nineteen hundred thirty-six, the terms of three shall expire on June thirtieth, nineteen hundred thirty-seven, and the term of one shall expire on June thirtieth, nineteen hundred thirty-eight. Vacancies shall be filled for the unexpired term by appointment by the commissioner. Members shall continue in office until their successors are appointed; in the event that no appointment is made within three months after a vacancy exists or after the expiration of the term of a member, the remaining members may fill the vacancy by a majority vote. If a member shall be absent from three consecutive regular meetings without adequate excuse his place may be declared vacant by the commissioner. Members of such advisory committee shall serve without pay, but shall be entitled to their reasonable and necessary traveling and other expenses incurred in connection with their duties. The advisory committee shall meet at least four times a year on the second Monday of January, April, July and October, and at any other time on call of the commissioner or any three members of the committee. Such advisory committee shall have access to all records of the division of self-insurance and shall have the power to require the presence before it of any employee of the division of self-insurance or any self-insurer. Information obtained by members of the advisory committee shall be deemed confidential unless disclosed by order of the committee. It shall be the duty of the advisory committee to advise the commissioner on all matters relating to self-insurance, particularly in respect to rules governing self-insurance, the deposit or withdrawal of securities, and on such other matters as the commissioner shall request. The commissioner shall detail to such advisory committee such stenographic or other assistance as may be necessary.

[1]From and after July first nineteen hundred thirty-six such expenses as shall be determined by the industrial commissioner and the department of audit and control as are necessary to carry out the provisions of this act shall be assessed against all self-insurers, including for this purpose employers who have ceased to exercise the privilege of self-insurance but whose securities are retained on deposit in accordance with the rules and regulations of the industrial commissioner. The basis of assessment shall be the proportion of such expense that the total securities of each depositor at the close of each fiscal year bore to the total deposits of all self-insurers. All such assessments when collected shall be paid into the state treasury as provided by section* thirty-seven of the state finance law. [*Subd.* 5 *added by L.* 1935, *ch.* 656, *and am'd by L.* 1937, *ch.* 108.]

* Renumbered § 121 by L. 1940, ch. 593.

[1] Rest of subdivision added by L. 1937, ch. 108.

Prior to the enactment of Chapter 108 of the Laws of 1937, § 2 of Chapter 656 of the Laws of 1935 provided that compensation payments be the basis of assessments. Prorating of assessments for a number of months less than one year is not permissible, fifty dollars minimum must be required: Opinions of Attorney-General, December 16, 1936 and May 13, 1937. The submission of a release insurance policy during the year does not absolve the employer from liability to pay minimum assessment: Opinion of Attorney-General, June 22, 1937. For methods of procedure in calculating assessments in various situations, see Opinions of Attorney-General, April 7, 1937, May 13, 1937, and October 29, 1937.

§ 51. **Posting of notice regarding compensation.** Every employer who has complied with section fifty of this chapter shall post and maintain in a conspicuous place or places in and about his place or places of business [1]or where such employer owns or operates automotive or horse-drawn vehicles and has no minimum staff of regular employees required to report for work at an established place of business, maintained by such employer then in a conspicuous place on such vehicle, typewritten or printed notices in form prescribed by the [2]commissioner, stating the fact that he has complied with all the rules and regulations of the [3]department and that he has secured the payment of compensation to his employees and their dependents in accordance with the provisions of this chapter. [4]Failure to post or maintain such notice in said automotive or horse-drawn vehicles shall constitute presumptive evidence that such employer has failed to secure the payment of compensation. [5]The commissioner may require any employer to furnish a written statement at any time showing the stock corporation or mutual association in which such employer is insured or the manner in which such employer has complied with any provision of this chapter. Failure for a period of ten days to furnish such written statement shall constitute presumptive evidence that such employer has neglected or failed in respect of any of the matters so required. [*As am'd by L.* 1922, *ch.* 615; *L.* 1940, *ch.* 483; *L.* 1941, *ch.* 243.]

[1] Words "or where . . . on such vehicle" inserted by L. 1940, ch. 483.
[2] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.
[3] Word "department" substituted for word "commission" by L. 1922, ch. 615.
[4] Following sentence inserted by L. 1941, ch. 243.
[5] Remainder of section added by L. 1922, ch. 615.

This is § 51 as amended by L. 1941, ch. 243. Compare § 51, following, as amended by L. 1941, chs. 373 and 639, and the notes thereunder.

Compare § 111.

The Department has prescribed a single poster combining the notice required by this § 51 with the notice required by subd. (2) of § 13-a, above. The employer may protect himself by calling the attention of his employees and of other persons to the posting of it: Sweeney v. Wait, 261 N. Y. Rep. 690; 262 N. Y. Rep. 566; 188 S. B. 113. But see amendments effected in § 51 by L. 1941, chs. 373 and 639.

Where farmer voluntarily secured insurance for his employees but failed to post notice thereof, remedy under Workmen's Compensation Law was held not exclusive: De Antonis v. Catalano, 256 App. Div. 10; 204 S. B. 499. But see amendments effected in § 51 by L. 1941, chs. 373 and 639.

§ 51. **Posting of notice regarding compensation.** Every employer who has complied with section fifty of this chapter shall post and maintain in a conspicuous place or places in and about his place or places of business [1]or where such employer owns or operates automotive or horse-drawn vehicles and has no minimum staff of regular employees required to report for work at an established place of business, maintained by such employer then in a conspicuous place on such vehicle, typewritten or printed notices in form prescribed by the [2]commissioner, stating the fact that he has complied with all the rules and regulations of the [3]department and that he has secured the payment of compensation to his employees and their dependents in accordance with the provisions of this chapter, [4]but failure to post such notice as herein provided shall not in any way affect the exclusiveness of the remedy provided for in section eleven of this chapter. [5]The commissioner may require any employer to furnish a written statement at any time showing the stock corporation or mutual association in which such employer is insured or the manner in which such employer has complied with any provision of this chapter. Failure for a period of ten days to furnish such written statement shall constitute presumptive evidence that such employer has neglected or failed in respect of any of the matters so required. [*As am'd by L.* 1922, *ch.* 615: *L.* 1940, *ch.* 483; *L.* 1941, *chs.* 373, 639.]

[1] Words "or where . . . on such vehicle" inserted by L. 1940, ch. 483.

[2] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.

[3] Word "department" substituted for word "commission" by L. 1922, ch. 615.

[4] Words "but failure . . . in section eleven of this chapter" inserted by L. 1941, chs. 373 and 639.

[5] Remainder of section added by L. 1922, ch. 615.

This is § 51 as amended by L. 1941, chs. 373 and 639, both of which effected the same amendment. Compare § 51, above, as amended by L. 1941, ch. 243, and the notes thereunder.

§ 52. **Effect of failure to secure compensation.** Failure to secure the payment of compensation shall constitute a misdemeanor, [1]punishable by a fine of not more than five hundred dollars or imprisonment for not more than one year, or both. [2]Where the employer is a corporation, the president, secretary and treasurer thereof shall be liable for failure to secure the payment of compensation under this section.

[3]All fines imposed under this chapter, except as herein otherwise provided, shall be paid [4]directly and immediately by the officer collecting the same to the [5]industrial commissioner for the benefit of the special fund created under subdivision eight of section fifteen of this chapter.

[6]In any prosecution hereunder the failure of the employer to file with the industrial commissioner, within ten days after demand, a verified statement showing specifically (a) the name of the stock company or mutual association in which such employer

is insured and the number and the date of issuance and term of such policy of insurance, or (b) that the said employer is insured with the state fund in which case he shall give the number of such policy of insurance, the date of issuance and term thereof, or (c) that the said employer has been authorized to do business as a self-insurer pursuant to section fifty of the workmen's compensation law, giving the date of said authorization, or (d) a legal reason, if any, why said employer is not required to secure compensation, shall constitute prima facie evidence that the employer has failed to secure compensation as herein required. The statement to be filed herein shall be verified by the employer or if the employer is a corporation by one of the officers herein named in which he shall state that he has read such statement subscribed by him and knows the contents thereof and that same is true of his own knowledge.

If, however, there has been an accident and the industrial board or a member thereof or a referee shall have made an award against the employer as a non-insured employer, the making of such award, except in a case where the employer had secured compensation insurance which was in effect at the time of the accident but the carrier later became insolvent, shall constitute prima facie evidence of an employment by the employer of an employee in an occupation in which the said employer was required to carry compensation and of the failure of the employer to secure the payment of workmen's compensation on the date of the accident involved in said award. A certified copy of such award shall be received as competent evidence of the making thereof in any criminal prosecution hereunder. [*As am'd by L.* 1916, *ch.* 622; *L.* 1922, *ch.* 615; *L.* 1926, *ch.* 532; *L.* 1930, *ch.* 698; *and L.* 1934, *ch.* 735.]

[1] Words "punishable . . . year, or both," substituted by L. 1922, ch. 615, for words "and have the effect of enabling the injured employee, or in case of death, his dependents or legal representatives, to maintain an action for damages in the courts, as prescribed by section eleven of this chapter."

[2] Words "Where . . . this section" inserted by L. 1926, ch. 532.

[3] Sentence "All fines . . . this chapter" added by L. 1922, ch. 615.

[4] Words "directly and immediately" inserted by L. 1930, ch. 698.

[5] Words "industrial commissioner for the benefit" substituted for words "state treasurer as custodian" by L. 1930, ch. 698.

[6] Rest of section added by L. 1934, ch. 735.

§§ 11 and 52 should be read together. This section is inoperative relative to private or domestic chauffeurs: § 3, subd. 1, gr. 12, above.

"Except as herein otherwise provided," see §§ 25, 126; penalties are also prescribed by §§ 31, 95, 96, 98 and 114.

PROSECUTION FOR NON-INSURANCE

For cases under this § 52 see People v. Imbesi, 235 App. Div. 636; 185 S. B. 338; People v. Hagan, 138 Misc. 771; 185 S. B. 334. For cases of pseudo-partnerships in evasion of the Law, see People v. Simons, 249 App. Div. 809; 274 N. Y. Rep. 554; 16 Ind. Bul. 217; People v. Levine, 160 Misc. 181; 204 S. B. 32, and for a case of a fake lease of barber chairs and equipment, see People v. Cartus, 253 App. Div. 705; 16 Ind. Bul. 526.

For additional prosecutions for failure to secure the payment of workmen's compensation, see 204 S. B. 500.

While this section makes certain officers of a corporation criminally liable, it does not impose any civil liability upon such officers: Opinion of Attorney-General, Sept. 22, 1937. See also Opinion of August 19, 1936.

Criminal prosecution for failure of a corporation to carry workmen's compensation insurance may be brought against a dominant and controlling person in the corporation, although not a corporate officer, if he counsels, aids or abets such violation of the Workmen's Compensation Law: Opinion of Attorney-General, February 21, 1940.

Concerning the statute of limitations in commencing prosecutions for violations of § 50, see Opinions of Attorney-General, May 25, 1937, and Sept. 25, 1937.

The amendment of the first sentence of this section by L. 1922, ch. 615, is in line with People v. Donnelly, 232 N. Y. 422; 114 S. B. 100.

§ 53. **Release from all liability.** An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier.

A former provision relative to assessment of state fund policy holders for compensation liabilities was stricken from § 100, now § 94, below, by L. 1922, ch. 615. In opinion of July 16, 1915, 81 S. B. 349, the Attorney-General held that assessments could not be levied upon them, in opinion of May 10, 1928, that the state fund's policy may exempt its policyholders from any and all liability for injury to their employees, and in opinion of February 19, 1931, that the legislature may make appropriation, if need should ever be, to prevent insolvency of the fund.

This § 53 holds an employer liable for workmen's compensation upon failure of a stock or mutual insurance company with which he may be insured to pay the same (Beekman v. Brodie, 249 N. Y. 175; 161 S. B. 224; Sciachitano v. Forbes, Inc., 264 N. Y. 324, 328; 185 S. B. 257). When a carrier raises the issue of policy coverage, proceedings must be taken under new § 54-a, below. Insolvencies and bankruptcies of stock insurance companies during the depression have caught numerous employers and have led—for future security—to the enactment of article 6-A, §§ 106–109-j, below, which see.

Upon insolvency of the carrier, the Appellate Division affirmed award of death benefits against the assured employer: Von Mansberg v. Nassau County Mortgage Co., 241 App. Div. 902; 185 S. B. 353; and the Municipal Court of New York City gave judgment to a physician against the assured employer for medical services: Hyman v. Hudson Contracting Co., 152 Misc. 7; 185 S. B. 353.

Compensation paid by an employer in case of his carrier's insolvency is a set-off against the carrier's conservator's claim for unpaid premiums: Pink v. Isle Theatrical Corp., 271 N. Y. 390; 15 Ind. Bul. 284; Van Schaick v. Astor, 154 Misc. 543; 185 S. B. 355.

Relative to the Department of Labor's procedure when payment of compensation is in default, including notice of hearings to receivers and liquidators of defunct carriers, see Opinion of Attorney-General, July 24, 1934 (Informal Opinions, 1934, pp. 527–530); relative to procedure to give employer credit for dividend on distributed assets of an insolvent insurance carrier sent to claimant by check, see Opinion of Attorney-General, September 4, 1936.

§ 54. **The insurance contract. 1. Right of recourse to the insurance carrier.** Every policy of insurance covering the liability of the employer for compensation issued by a stock company or by a mutual association authorized to transact workmen's compensation insurance in this state shall contain a provision setting forth the right of the [1]commissioner to enforce in the name of the people of the state of New York for the benefit of the person entitled to the compensation insured by the policy either by filing a separate application or by making the insurance carrier a party to the original application, the liability of the insurance carrier in whole or in part for the payment of such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance carrier shall to the extent thereof be a bar to the recovery against the other of the amount so paid. [*Subd.* 1 *am'd by L.* 1922, *ch.* 615.]

[1] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.

2. **Knowledge and jurisdiction of the employer extended to cover the insurance carrier.** Every such policy shall contain a provision that, as between the employee and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this chapter.

3. **Insolvency of employer does not release the insurance carrier.** Every such policy shall contain a provision to the effect that the insolvency or bankruptcy of the employer shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employee during the life of such policy.

4. **Limitation of indemnity agreements.** Every contract or agreement of an employer the purpose of which is to indemnify him from loss or damage on account of the injury of an employee by accidental means, or on account of the negligence of such employer or his officer, agent or servant, shall be absolutely void unless it shall also cover liability for the payment of the compensation provided for by this chapter. [1]Every such contract or agreement of insurance issued by an insurance carrier covering the liability of an employer for the payment of the compensation provided by this chapter shall be deemed to include all employees of the employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations set forth in such contract or agreement[2] and employees for whose injuries a contractor may become liable under the provisions

of section fifty-six of this chapter. Any employee or employees or class of employees not enumerated in section three, subdivision one, group one to seventeen inclusive, of this chapter, employed by a municipal corporation or political subdivision of the state, may by the terms of the contract or agreement be expressly excluded therefrom. [*Subd.* 4 *am'd by L.* 1928, *ch.* 754; *L.* 1939, *ch.* 404.]

[1] Sentence "Every such contract . . . or agreement, unless any such employee or employees, or class of employees, shall by the terms of such contract or agreement be expressly excluded therefrom" inserted by L. 1928, ch. 754; words "unless any such employee . . . excluded therefrom" stricken out by L. 1939, ch. 404.

[2] Remainder of this subdivision added by L. 1939, ch. 404.

INSURANCE POLICY COVERAGE

Laws of 1928, ch. 754, amended this subd. 4 by inserting therein the provision that, "Every such contract or agreement of insurance issued by an insurance carrier covering the liability of an employer for the payment of the compensation provided by this chapter shall be deemed to include all employees of the employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations set forth in such contract or agreement, unless any such employee or employees, or class of employees, shall by the terms of such contract or agreement be expressly excluded therefrom." Laws of 1939, ch. 404, amended this provision by striking therefrom the words, "unless any such employee or employees, or class of employees, shall by the terms of such contract or agreement be expressly excluded therefrom."

Amendment to this subdivision effected by L. 1928, ch. 754, does not apply when the accident has happened prior to its enactment: Hernandez v. Weinstock & 923 Columbus Ave. Corp., 261 N. Y. Rep. 702; 185 S. B. 305; the Attorney-General cited it and the court affirmed the awards in Fiorentino v. Slutsky, 241 App. Div. 640; 13 Ind. Bul. 27; and Lonky v. Rapid Construction Co., 241 App. Div. 901; 13 Ind. Bul. 178. The Appellate Division also affirmed awards under this subdivision in Sullivan v. Audlane Realty Corp., 246 App. Div. 872; 204 S. B. 521, and Gormis v. Paxton Realty Corp., 246 App. Div. 872; 15 Ind. Bul. 30.

Subcontractor's insurer was held not liable for compensation to uninsured sub-subcontractor's employee in absence of proof that policy covered sub-subcontractor's employees: Passarelli v. Columbia E. & C. Co., 270 N. Y. 68; 204 S. B. 539. But see amendment to this subd. 4 effected by L. 1939, ch. 404.

Carrier's contention that its policy did not cover the location of accident was not sustained in the following cases:

Where policy specified "locations of all factories, shops, yards, buildings, premises or other workplaces" of the employer and the employee was detailed to work at employer's residence: McClure v. Van Vliet & Son, 255 App. Div. 905; 280 N. Y. Rep. 608; 204 S. B. 522.

Where New Jersey resident employed by a New Jersey corporation worked in New York City four months and was fatally injured there: Grasso v. Donaldson-Reynolds, Inc., 254 App. Div. 913; 279 N. Y. Rep. 584; 204 S. B. 99.

Where a handy man employed by a partnership conducting an undertaking establishment incurred injuries while repairing a building adjoining the establishment which was owned by one of the partners and used in connection with the undertaking business: Schultz v. E. W. and W. D. Allanson, 258 App. Div. 1010; 204 S. B. 522; 284 N. Y. Rep. 611.

Where janitor of several apartment houses was detailed to the employer's private residence to trim a tree on the grounds and fell from a ladder, the employer having a "care, custody and maintenance" policy which, while specifically listing the location of the apartment houses, included a provision to the effect that the carrier agreed to indemnify the employer "against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada": Sponheimer v. Kelly, 259 App. Div. 767; 204 S. B. 527.

Where policy endorsement required notification to the carrier of each new job or location before beginning work and claimant was injured on a job for which no notice had been given, the court holding that the formality relative to notice had never been complied with and accordingly could not now be invoked: Wanamaker v. Selfridge, 255 App. Div. 892; 259 App. Div. 493; 204 S. B. 526; 285 N. Y. Rep. ——.

Carrier's contention that its policy did not cover the location of accident was sustained in the following cases:

Where claimant was working on a farm not owned by the employer but in which it was indirectly interested: Cranston v. Walton Water Co., 253 App. Div. 850; 204 S. B. 528.

Where policy covered employer's retail stores in New York City and claimant was injured on employer's farm: Bennett v. Stoneleigh Farms, Inc., 254 App. Div. 790; 204 S. B. 10.

Carrier's contention that its policy did not cover the injured employee was not sustained in the following cases:

Where policy specified "watchman" and injured employee was a laborer and cleaner: Imperiole v. A. H. & L. Building Corp., 255 App. Div. 739; 204 S. B. 518.

Where policy specified "installation of house furnishings" and employee was detailed to move furniture in employer's home: McClure v. Van Vliet & Son, 255 App. Div. 905; 280 N. Y. Rep. 608; 204 S. B. 522. See also Caputo and Chirillo v. Voges Mfg. Co., 257 App. Div. 871; 204 S. B. 517.

Where employer was in beer business and the policy specified salesmen, all business operations and operative management conducted at or from the employer's place of business, and deceased, a beer salesman, was killed while inspecting second-hand building material for a warehouse for the employer: Scheidelman v. Scheidelman & Sons, Inc., 255 App. Div. 906; 204 S. B. 518.

Where policy expressly covered claimant by name as an employee and claimant was an elective town superintendent of highways: Dann v. Town of Veteran, 254 App. Div. 462; 278 N. Y. 461; 204 S. B. 533.

Where policy covered only trucking for the U. S. Government and the Industrial Board found that the agent of the insurance carrier was in full possession of all facts concerning the employer's business: Prisco v. Guiliano, 252 App. Div 713; 277 N. Y. Rep. 659; 204 S. B. 24.

Where policy excluded members of the employer's family who performed voluntary services and claimant was a niece by marriage who received wages: Zimmerman v. Taubman, 254 App. Div. 612; 204 S. B. 519.

Laws of 1939, Ch. 404.

Chapter 404, Laws of 1939, which amended this sub-division by striking therefrom the provision permitting exclusion of certain employees from policy coverage was held not to apply to employees voluntarily brought within the Act: Opinion of Attorney-General, September 19, 1939.

5. **Cancellation of insurance contracts.** No contract of insurance issued by an insurance carrier against liability arising under this chapter shall be cancelled within the time limited in such contract for its expiration until at least ten days after a notice of cancellation of such contract, on a date specified in such notice, shall be filed in the office of the [1]commissioner and also served on the employer; [2]provided, however, that if the employer has secured insurance with another insurance carrier which becomes effective prior to the expiration of the time stated in such notice, the cancellation shall be effective as of the date of such other coverage. Such notice shall be served on the employer by delivering it to

him or by sending it by mail, by registered letter, addressed to the employer at his or its last known place of [3]business; provided that, if the employer be a partnership, then such notice may be so given to any one of the partners, and if the employer be a corporation then the notice may be given to any agent or officer of the corporation upon whom legal process may be served. Provided, however, the right to cancellation of a policy of insurance in the state fund shall be exercised only for non-payment of premiums [4]or as provided in section ninety-four of this chapter. [*Subd. 5 am'd by L.* 1916, *ch.* 622; *L.* 1922, *ch.* 615; *L.* 1937, *ch.* 559; *L.* 1939, *ch.* 668.]

[1] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.
[2] Words "provided . . . coverage" inserted by L. 1937, ch. 559.
[3] Word "business" substituted for word "residence" by L. 1937, ch. 559.
[4] Words "or as provided in section ninety-four of this chapter" added by L. 1939, ch. 668.

CANCELLATION OF INSURANCE CONTRACTS

Policy not having "issued," these cancellation provisions did not apply in Vacco v. Aletti, 5 Ind. Bul. 114; 215 App. Div. 854; 149 S. B. 226.

Notice of cancellation of a policy by registered letter is effective upon posting of the letter: Skoczlois v. Vinocour, 221 N. Y. 276; 95 S. B. 226; the ten days begin to run from the date of mailing: Newman v. Singer, 12 S. D. R. 579, 2 Bul. 106: cancellation is not effected if notice is not filed in the commissioner's office: Arner v. Manhattan Spring & Couch Co., 264 N. Y. Rep. 501; 185 S. B. 285, 286; Hamberger v. Wolfe-Smith Co., 28 S. D. R. 576; 205 App. Div. 739; 123 S. B. 65; Burke v. New System W. W. Laundry, 32 S. D. R. 710; 140 S. B. 203; or is not received by employer because not mailed to right address: Ingberg v. Zimmerman, 261 N. Y. Rep. 551; 185 S. B. 284; Zito v. Muto, 228 App. Div. 741; 9 Ind. Bul. 113. See also 162 S. B. 157, 159, 160.

The Court of Appeals, reversing the Appellate Division, held that this notice must be given by the carrier in all cases whether the cancellation is by an act of the carrier alone, through request on the part of the employer or by agreement between the parties: Otterbein v. Babor & Comeau Co., 248 App. Div. 651; 272 N. Y. 149; 204 S. B. 508.

A carrier may waive cancellation by its conduct thereafter: Mollick v. Modern Roofing Co., 259 N. Y. Rep. 642; 185 S. B. 284; Rossi v. Ciampi & Sons, 264 N. Y. Rep. 499; 185 S. B. 285.

When a policy is "cancelled flat" the insurer remains liable if it does not comply with the notice provisions of this subd. 5: Passarelli v. Columbia E. & C. Co., 270 N. Y. 68; 204 S. B. 539; Gordon v. Walker, 233 App. Div. 784; 185 S. B. 286.

Prior to the 1937 amendment it was held that the ten days' requirement applies though the employer has accepted cancellation before occurrence of accident and procured other and valid insurance: Arner v. Manhattan Spring & Couch Co., 264 N. Y. Rep. 501; 13 Ind. Bul. 80; also that cancellation of a policy is effective ten days after notice is filed in the office of the Department of Labor irrespective of earlier date specified in such notice: Gramo v. Greenpoint Contracting Co., 209 App. Div. 250; 133 S. B. 201.

Carriers opposing their assured employers' interests should be careful to give such employers notice thereof: Hammele v. McMahon, 220 App. Div. 60; 156 S. B. 255; Zaro v. Zaro Tourist & S. S. Ticket Agency, 222 App. Div. 700; 156 S. B. 255; Szabo v. Standard Commercial Body Corp., 221 App. Div. 722; 156 S. B. 255; Boos v. Boos, 222 App. Div. 705; 161 S. B. 201; De Rose v. Stento, 228 App. Div. 867; 9 Ind. Bul. 171.

The conditions and relations of cancellation of state fund policies under this subdivision and withdrawal from the state fund under § 94 are interpreted in Schwartz et al. v. Window Cleaning Cos., 5 Bul. 107; 98 S. B. 66; the department may cancel state fund policies and make rules relative to such cancellation: Letter of Attorney-General, 81 S. B. 356, February 11, 1916; concerning signature of state fund cancellation, see Opinion of Attorney-General, June 6, 1935.

For additional cases involving cancellation of insurance, see 162 S. B. 157, 185 S. B. 284, and 204 S. B. 508–511.

Estoppel from pleading want of insurance coverage.

Carrier defended its assured employer in workmen's compensation proceedings unaware that its policy had expired prior to the accident. Said carrier first raised the question of coverage in its application to the Industrial Board for rehearing after an award had been made against it by a referee. The Industrial Board sustained the carrier's contention as to non-coverage and discharged it from liability. Upon appeal, the Appellate Division remitted the matter to the Board to have the award against the carrier reinstated, stating that, by its conduct, the carrier waived the question of coverage. Upon further appeal, the Court of Appeals reversed the order of the Appellate Division and affirmed the decision of the Industrial Board, with statement that, "There is authority in these sections [§§ 23, 123, W. C. L.] to take new evidence after the referee has made his decision and make a determination thereon." Levine v. Comet Painting & Decorating Co., Inc., 258 App. Div. 832; 284 N. Y. 359.

6. [1]**Insurance of [2]officers of corporations.** [3]Every executive officer of a corporation shall be deemed to be included in the compensation insurance contract [4]or covered under a certificate of self insurance unless he elects [5]to be excluded from the coverage of this chapter. [6]Such election shall be made in writing on a form prescribed by the industrial commissioner and filed with the insurance carrier [7]and shall [14]be effective with respect to all of the policies issued to the corporation by such insurance carrier as long as it shall continuously insure the corporation, provided that within sixty days preceding each renewal date of the insurance contract written notice of the continuation of the election is given to such executive officer by delivering it to him or by letter for which a receipt of mailing is furnished by the United States post office department. Such election shall not be revoked until thirty days after a notice of revocation in writing has been filed with the commissioner and with the insurance carrier on a form prescribed by the industrial commissioner. If not excluded, [8]such officers [9]and their dependents shall be entitled to compensation [10]as provided [11]by this chapter. The estimation of their wage values, respectively, shall be reasonable and separately stated and added to the valuation of the payrolls upon which the premium is computed. [12]The officers so insured shall have the same rights and remedies as any employee, [13]but any executive officer who files an election not to be included under this chapter shall be deemed not to be an employee within the intent of this chapter.

[15]Any officer or officers, elective or appointive, of a municipal corporation or other political subdivision of the state complying with the provisions of group nineteen of subdivision one of section three of this chapter shall be deemed executive officers subject to the provisions of this subdivision. [*Subd.* 6 *added by L.* 1916,

ch. 622; *am'd by L.* 1922, *ch.* 615; *L.* 1926, *ch.* 258; *L.* 1930, *ch.* 316; *L.* 1937, *ch.* 106; *L.* 1939, *ch.* 241; *L.* 1941, *ch.* 875.]

[1] Side title inserted by L. 1922, ch. 615.

[2] Words "employers and" stricken out by L. 1930, ch. 316.

[3] Words "Every executive officer of a corporation shall be deemed to be included in the compensation insurance contract unless he elects not to be brought within the coverage of this chapter" substituted by L. 1930, ch. 316, for words "Employers or executive officers of corporations shall not be included in the compensation insurance contract unless they elect to be brought within the coverage of this chapter, in which case such policies shall insure" which words had been substituted by L. 1926, ch. 258, for words "Any insurance carrier may issue policies, including with employees, employers or executive officers or corporations who perform labor incidental to their occupations, such policies insuring."

[4] Words "or covered . . . self insurance" inserted by L. 1937, ch. 106.

[5] Words "to be excluded from" substituted for words "not to be brought within" by L. 1937, ch. 106.

[6] Word "Such" substituted for word "The" by L. 1937, ch. 106. Words "The election . . . is computed" as they read before the 1937 amendments substituted by L. 1930, ch. 316 for words "in which case such policies shall insure to such employers or officers the same compensations provided for their employees, and at the same rates; provided, however, that the estimation of their wage values, respectively, shall be reasonable and separately stated in and added to the valuation of their payrolls upon which their premium is computed."

[7] Words "and shall not . . . the industrial commissioner" inserted by L. 1937, ch. 106.

[8] Words "the policy shall insure to" eliminated by L. 1937, ch. 106.

[9] Words "and their dependents shall be entitled to" substituted for words "the same" by L. 1937, ch. 106.

[10] Word "as" inserted by L. 1937, ch. 106.

[11] Words "by this chapter" substituted for words "for other employees, and at the same rates," by L. 1937, ch. 106.

[12] Words "The officers . . . as any employee" substituted by L. 1930, ch. 316, for words "The employer or officers so insured shall have the same rights and remedies given an employee by this chapter."

[13] Word "but" substituted for word "and" by L. 1937, ch. 106, and remainder of paragraph added by L. 1930, ch. 316.

[14] Words "be effective . . . Such election shall" inserted by L. 1939, ch. 241.

[15] Concluding paragraph added by L. 1941, ch. 875.

COVERAGE OF CORPORATION OFFICERS

In three cases of accident the Court of Appeals held that a corporation officer actually employed to perform services for the corporation as an employee could have workmen's compensation against his employer's carrier for accidental injury in the course of such services independently of this subd. 6 as it read prior to April 5, 1926; Skouitchi v. Chic Cloak & Suit Co., 230 N. Y. 296; 106 S. B. 159; Small v. Gibbs Press, 222 App. Div. 699; 248 N. Y. Rep. 513; 156 S. B. 23; Goldin v. Goldin Decorating Co., 247 N. Y. Rep. 603; 156 S. B. 24; but in a later case held that amendment of subd. 6 as of such date rendered the three cases inapplicable as precedents: Esbinsky v. Betty Court Garage, 259 N. Y. 15; 185 S. B. 293; the term "executive" makes distinction among officers: Bowne v. Bowne Co., 221 N. Y. 28; 87 S. B. 189. The courts, with opinions, affirmed award to a corporation officer because of compliance with this subd. 6: Hubbs & Addison Electric Light & Power Corp., 191 App. Div. 765; 230 N. Y. 303; 106 S. B. 161–164.

Litigation due to failure to state wage values separately in compliance with this subd. 6, or due to minimum premium payment with final audit after accident, is illustrated in the cases cited above and in Salatto v. Salatto Bros., 256 N. Y. Rep. 569; 185 S. B. 297; Kolpein v. O'Donnell Lumber Co., 230 N. Y. 301; 106 S. B. 164; Abrahams v. Charmant Specialty Co., 212 App. Div. 697; 140 S. B. 33, 34.

The Appellate Division affirmed award against a carrier under this subd. 6 for accident in 1931 though its policy, entered into before L. 1930, ch. 316, became effective, excluded officers: Bray v. Bray Bros., Inc., 236 App. Div. 771; 185 S. B. 295.

Election to be excluded

Failure to execute "exclusion form" upon renewal of policy figured in Gassman v. S. & A. Service Corp., 256 App. Div. 868; 204 S. B. 511.

An award to a corporation officer who did not execute an "exclusion form" upon renewal of the firm's insurance policy was affirmed: Katz v. Pollyanna Trading Corp., 257 App. Div. 1093; 204 S. B. 512.

See amendments effected in this subd. 6 by L. 1939, ch. 241.

Elective town superintendent of highways

An elective town superintendent of highways was held to be an executive officer of a municipal corporation and included in its workmen's compensation policy: Van Buren v. Town of Richmondville, 257 App. Div. 1089; 204 S. B. 513. See also Dann v. Town of Veteran, 254 App. Div. 462; 278 N. Y. 461; 204 S. B. 533; Clemens v. Town of Osceola, 257 App. Div. 884; 204 S. B. 189.

Officer not bona fide, effect

The exemption effectuated by signing the waiver prescribed in this subdivision is intended to apply only to bona fide executive officers whose work is exclusively of an executive character: Opinion of Attorney-General, July 17, 1936; the exemption would not apply where the so-called executive officer was illiterate and signed the waiver without full knowledge and consent or where the employer intended to evade the law by having workingmen so sign as executive officers, Opinion, July 2, 1937.

Exclusion under this Subdivision was held invalid where employee who was not a bona fide officer signed waiver as vice-president: Goldman v. Ansonia Floor Covering Co., Inc., 255 App. Div. 736; 204 S. B. 514.

Partners

Partners and individual employers are elminated from the coverage of this subd. 6 by L. 1930, ch. 316; they have never been covered for workmen's compensation independently of it: Lyle v. Lyle Cider & Vinegar Co., 243 N. Y. 257; 149 S. B. 25; Duprea v. Duprea Bros., 224 App. Div. 673; 156 S. B. 26; Le Clear v. Smith & Le Clear, 207 App. Div. 71; 133 S. B. 35; Munter v. Ideal Peerless Laundry, 229 App. Div. 56; 185 S. B. 300; Baker v. Nu-Art Advertising Co., 244 App. Div. 386; 185 S. B. 302. For prosecutions of false partnerships, see People v. Kaplan and People v. Levine, 160 Misc. 179, 181; 204 S. B. 38, 32; of a fake lease of barber chairs and equipment, People v. Cartus, 253 App. Div. 705; 16 Ind. Bul. 526.

7. **Limitation of the issuance of policies by a foreign insurance company.** No policy or contract of insurance issued by a foreign stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state, except a corporation organized under the laws of a state or country outside of the United States and domiciled in this state, covering or intended to cover the liability of an employer to his employees under this chapter, shall be accepted as a compliance with subdivision two of section fifty of this chapter, unless such foreign stock corporation or mutual association shall have filed with the superintendent of insurance a bond or undertaking with good and sufficient sureties to the people of the state of New York, and conditioned upon the payment in full of any and all compensation and benefits as provided in this chapter to any and all persons entitled thereto under any such policy or contract of insurance. Such bond shall be approved as to form by the attorney-general

and as to sufficiency by the superintendent of insurance. The amount of such bond shall be such sum as may reasonably represent twenty-five per centum of the outstanding reserves for compensation losses on policies issued by such foreign stock corporation or mutual association upon risks located in the state of New York as determined by law or by the requirements of the superintendent of insurance, provided, however, that the amount of such bond shall in no case be less than twenty-five thousand dollars nor more than one million dollars. Such bond shall be renewed annually. Every such bond shall contain a provision authorizing the attorney-general upon the certificate of the superintendent of insurance that there has been default in the payment of compensation for thirty days or that the bonded company has become insolvent to enforce such bond in the name of the people of the state of New York for the benefit of any and all persons entitled to the compensation assured by any policy issued by such foreign stock corporation or mutual association or otherwise entitled to any benefits under such policy. In lieu of the bond required to be given hereunder any such foreign stock corporation or mutual association may deposit with the superintendent of insurance securities of the kind prescribed in section [2]one hundred two of the insurance law in an amount equal to twenty-five per centum of the outstanding reserves for compensation losses on policies issued by such foreign stock corporation or mutual association upon risks located in the state of New York, but not less than twenty-five thousand dollars nor more than one million dollars. In computing the amount of such securities they shall be valued as determined by the superintendent of insurance in valuing the assets of insurance companies. Such securities shall be held by the superintendent of insurance as a special deposit and as express security for the payment of such compensation or benefits and may be sold by the said superintendent without notice in the event that there has been default in the payment of compensation for thirty days or that the depositing company has become insolvent. The income thereon shall be collected by the superintendent of insurance and, prior to any default in the payment of such compensation or benefits, shall be paid over by him to the stock corporation or mutual association depositing the same.

[1]However, no such bond or undertaking shall be required to be filed after July first, nineteen hundred thirty-eight, by any carrier making payment to the stock or mutual funds respectively established by sections [3]one hundred seven and [4]one hundred nine-d of this chapter. [*Subd. 7 added by L.* 1929, *ch.* 305; *am'd by L.* 1935, *ch.* 255; *L.* 1940, *ch.* 435.]

[1] Concluding paragraph added by L. 1935, ch. 255.

[2] Words "one hundred two" substituted for word "thirteen" by L. 1940, ch. 435.

[3] Words "one hundred seven" substituted for words "sixty-one" by L. 1940, ch. 435.

[4] Words "one hundred nine-d" substituted for words "sixty-seven" by L. 1940, ch. 435.

Deposits by workmen's compensation insurance corporations of other States are also required and regulated by § 103 of the Insurance Law.

An employer who—compulsorily or voluntarily—pays compensation because of the insolvency of his foreign insurance carrier does not on that account have a share in the fund provided by this subd. 7: International Reinsurance Corp. (Matter of People), 270 N. Y. Rep. 507, 613; 204 S. B. 501.

A new bond given pursuant to this subd. 7's provision for annual renewance supersedes former bonds as to future defaults: People v. Columbia Casualty Co., 155 Misc. 91; 185 S. B. 350; the rule applies to the deposited securities also: International Reinsurance Corp. (Matter of People), 271 N. Y. 381; 204 S. B. 506; these decisions give priority to compensation awards by New York over compensation awards by other States; in connection, see notes under § 34, above.

For liability covered by bonds furnished under subd. 7, see Opinions of Attorney-General, September 12, 1933, November 28, 1933, and June 15, 1934; and for parties entitled to share distribution of deposits in event of carrier's insolvency: Opinion of Attorney-General December 22, 1933.

General Notes on § 54

Effective date of insurance policy—determination. Cases of accidents occurring on the days of issuance of policies with coverage running from 12:01 a. m. are: Rosen v. Ostrofsky, 264 N. Y. Rep. 494; 185 S. B. 291; Weydman v. Niagara Boiler Works, 264 N. Y. Rep. 503; 185 S. B. 292; Saunders v. Fitzgerald, 240 App. Div. 795; 185 S. B. 292; and Orto v. Poggioni, 245 App. Div. 782; 271 N. Y. Rep. 551; 204 S. B. 514.

Expiration date of insurance policy—determination. For cases where a policy was to expire at 12:01 a. m., November 11, 1934, and was extended one month to expire on December 11, 1934, and the accident occurred at 2 p. m. on the latter date, see Garelick v. Rosen, 274 N. Y. 64, and Orlando v. Rosen, 274 N. Y. Rep. 472; 204 S. B. 515.

Name of assured in policy incorrect—effect on coverage. An uncle and a nephew formed a co-partnership, doing business under the name of the nephew. The latter was the active partner conducting the business and his uncle was the silent partner. A workmen's compensation insurance policy was secured in the name of the nephew as an individual. A chauffeur in the employ of the partnership was injured in the course of his work. Award against the carrier was affirmed, with statement, "The intent to cover the business is not questioned. The name of the insured under such conditions is unimportant." Greenstein v. Kastonowitz, 261 App. Div. 858.

An individual employer who takes a partner or incorporates his business should look to it that his workmen's compensation policy is changed, with knowledge and consent of the carrier, to the name of the partnership or company, instead of his own name and in other respects adjusted to the new situation. Also a partner who gets rid of one partner and takes on another should look to it that his workmen's compensation policy is changed to the new partnership name. Otherwise, upon occurrence of an accident to an employee, the partnership or corporation may find itself without insurance; citations to cases in point are on page 15, above. Partners and individual employers may no longer insure themselves under subd. 6 of this § 54; see notes under subd. 6.

The question of effective transfer of policies is involved in Koib v. Brummer, 185 App. Div. 835; 226 N. Y. Rep. 570; 95 S. B. 230; Hargraves v. Shevlin Mfg. Co., 10 S. D. R. 641; 179 App. Div. 477; 222 N. Y. 646; 95 S. B. 234; Nolan v. Shevlin Mfg. Co., 15 S. D. R. 640; 3 Bul. 155; Aprea v. David & Co., 16 S. D. R. 489; 3 Bul. 195; and Mark v. Berman, 14 S. D. R. 599; 2 Bul. 256.

Reformation of insurance policy. The Board has full jurisdiction and equity powers to reform insurance policies because of error, fraud or mutual mistake. If the question of reformation is sumbitted to the Board, such submission excludes initiatory proceedings in the courts but, if it is not, action in the courts is open to the parties. These principles are set forth in the following cases: Royal Indemnity Co. v. Helier, 256 N. Y. 322; 185 S. B. 273; Barone v.

Aetna Insurance Co., 260 N. Y. 410; 185 S. B. 276; McMahon v. Gretzula, 267 N. Y. Rep. 573; 185 S. B. 283; Continental Casualty Co. v. Gleasner C. A. S. & E. Co., 239 App. Div. 487; 185 S. B. 279. For question whether reformation should be made or not, see Schubert v. Heller, 235 App. Div. 20; 185 S. B. 275 Gleasner v. Gleasner, C. A. S. & E. Co., 245 App. Div. 343; 269 N. Y. Rep. 590; 204 S. B. 314; Orto v. Poggioni, 271 N. Y. Rep. 551; 204 S. B. 514; and La Morticella v. La Morticella Bros., 244 App. Div. 839; 14 Ind. Bul. 144; Haskell v. Hitchcock and Sweet, 262 App. Div. 309, July 2, 1941.

Other cases. The Court of Appeals held three carriers jointly liable: Arner v. Manhattan Spring & Couch Co., 264 N. Y. Rep. 501; 185 S. B. 285, 286; and two carriers: Otterbein v. Babor & Comeau Co., 272 N. Y. 149; 204 S. B. 508; Clifford and Yarrington v. Marine Trust Co., 249 N. Y. Rep. 526; 161 S. B. 188, 189. The Board's jurisdiction and duty to apportion compensation liability between two or more carriers were asserted by the Appellate Division in opinion in Grabenstatler v. Rock Asphalt & Construction Co., 215 App. Div. 257; 149 S. B. 233; having earlier been denied by it in opinion in Hargraves v. Shevlin Mfg. Co., 10 S. D. R. 641; 179 App. Div. 477; 222 N. Y. Rep. 646; see also Di Donato v. Rosenberg, 225 App. Div. 712; 161 S. B. 199; 230 App. Div. 538; 256 N. Y. 412; 185 S. B. 513; Connolly v. Tucker Electrical Construction Co., 14 S. D. R. 716; 3 Bul. 119; affd., 184 App. Div. 921; 87 S. B. 289, 290; Uretsky v. Gold & Sons, 218 App. Div. 795; 156 S. B. 252; Teufel v. Lido Club Hotel, 228 App. Div. 870; 9 Ind. Bul. 204.

The Commission's regulation of payment by carriers in extra-territorial cases is illustrated in Jenkins v. Hogan & Sons, 9 S. D. R. 380; 87 S. B. 286; 177 App. Div. 36; Gilbert v. Des Lauriers Column Mould Co., 180 App. Div. 59; 87 S. B. 289; and Beaudet v. Mertz Sons, Case No. 4047; 181 App. Div. 963; —— N. Y. Rep. ——, May 28, 1918; 87 S. B. 289 (not reported in New York Reports). See also Cameron v. Ellis Construction Co., 253 N. Y. Rep. 559; 252 N. Y. 394; 177 S. B. 208; McMahon v. Gretzula, 242 App. Div. 742; 267 N. Y. Rep. 573; 185 S. B. 282, 283; Zapela v. Katz, 225 App. Div. 836; 185 S. B. 322.

Carrier under Connecticut compensation law is not liable for contribution with carrier under New York compensation law when injured employee may claim in either state: Exchange Mutual Indemnity Ins. Co. v. Zurich General A. F. and L. Insurance Co., 122 Misc. 386; 133 S. B. 203.

Doubt as to the identity of the employer may cast doubt upon the identity of the carrier; see notes under § 2, subd. 3, above.

Identification and responsibility of the insurance carrier may become matters for contest when an employee received two or more accidents in succession: Anderson v. Babcock & Wilcox Co., 256 N. Y. 146; 185 S. B. 168; Phillips v. Holmes Express Co., 190 App. Div. 336; 229 N. Y. Rep. 527; 98 S. B. 68; Jacobsen v. Harden Contracting Co., 232 App. Div. 857; 185 S. B. 179, 468; Mackin v. Curran-Auto Transport Co., 261 N. Y. Rep. 629; 185 S. B. 169, 170; Aloisi v. Hatkoff, 270 N. Y. Rep. 634; 204 S. B. 168; or where the employer carries on different businesses in different localities under insurance with more than one carrier: Neubeck v. Doscher, 204 App. Div. 617; 209 App. Div. 843; 123 S. B. 66; 133 S. B. 203; Schilling v. Wander Iron Works, 217 App. Div. 705; 149 S. B. 104, 234; or even a single business in one or more localities with two or more carriers: Cameron v. Ellis Construction Co., 253 N. Y. Rep. 559; 252 N. Y. 394; 177 S. B. 208; Clifford v. Marine Trust Co., 249 N. Y. Rep. 526; 161 S. B. 199. For further history of the Neubeck case see New Amsterdam Casualty Co. v. Commercial Casualty Ins. Co., 129 Misc. 466; 156 S. B. 244; in U. S. Casualty Co. v. Melrose Paper Stock Co., 143 Misc. 166; 185 S. B. 331, analogous to the Neubeck case, the court modified judgment by striking out recovery against the injured employee; for additional two-accident and two-carrier cases, see 162 S. B. 160, 161; for citations to consequential and non-consequential two-accident cases, note, page 33, above.

For an action to recover alleged overpayment of workmen's compensation premiums, see Kaplan v. Travelers Insurance Co., 149 Misc. 860; 152 Misc. 825; 13 Ind. Bul. 308. For review of the law governing rate-making, see Opinion of Attorney-General, December 9, 1935. Except under certain conditions, an insurance

policy may not be written to cover more than a single legal entity: Opinion of Attorney-General, February 28, 1934.

No policy stipulations have force or effect as between carrier and an employee injured while the policy is outstanding: Aioss v. Sardo, 223 App. Div. 201; 156 S. B. 252; 249 N. Y. 270; 161 S. B. 200; Marino v. Sardo, 221 App. Div. 604; 156 S. B. 253.

The Industrial Board has full judisdiction of disputes between employer and insurer: §§ 54, 20 and 23 are to be read together; Skoczlois v. Vinocour, 7 S. D. R. 443; 176 App. Div. 924; 221 N. Y. 276; 95 S. B. 226; Bloom v. Tilin & Bleek, 5 S. D. R. 441; Opinion of Attorney-General, 81 S. B. 358–363, August 16, 1935.

Relative to liability under a deposit premium plan, see Lemmo v. Hayes Construction Co., 20 S. D. R. 404.

The carrier's obligation to defend suit against the employer has been upheld in Zamkin v. U. S. Fidelity & Guaranty Co., 121 Misc. 699; 123 S. B. 12, 13; and Parker Sheet Metal Works v. Allied Mutuals Liability Ins. Co., 124 Misc. 756; 140 S. B. 215.

Questions of brokers' binders and oral agreements of insurance have figured in the Hargraves and Mark cases, above, and in Seiderman v. Perla, 268 N. Y. 188; 185 S. B. 287; Mearian v. Miscall, 266 N. Y. Rep. 625; 185 S. B. 288, 289; Lyle v. Lyle Cider & Vinegar Co., 243 N. Y. 257; 149 S. B. 24, 25; McMahon v. Gretzula, 267 N. Y. Rep. 573; 185 S. B. 282, 283; Lane v. Lane, 229 App. Div. 50; 185 S. B. 289; Piluso v. Travelers Insurance Co., 229 App. Div. 812; 185 S. B. 290; O'Shaughnessy v. Empire Construction Co., 16 S. D. R. 467; 186 App. Div. 927; 95 S. B. 238; Dobroski v. Supreme Window Cleaning Co., 32 S. D. R. 64; 213 App. Div. 838; 140 S. B. 202; Manchuk v. Eisenberg, 215 App. Div. 850; 149 S. B. 226; Vacca v. Aletti, 215 App. Div. 854; 149 S. B. 226; Abrahams v. Charmant Specialty Co., 212 App. Div. 697; 140 S. B. 34, and in other cases cited in 162 S. B. 158; 185 S. B. 290; the question of acceptance of risk in Levine v. Fox, 16 S. D. R. 503; 3 Bul. 197.

Cases illustrating the question of limitation of policies to localities are: Schorling v. Empire Personal Loan Co., 251 App. Div. 573; 204 S. B. 529; Wingen v. Fleischman, 252 N. Y. 114; 185 S. B. 309; Pettit v. Reges, 242 N. Y. 272; 149 S. B. 229; Simpkins v. Steffen, 255 N. Y. 65; 185 S. B. 312; Anderson v. Abbott-Cheney Paper Corp., 259 N. Y. 26; 185 S. B. 315; Kretchmer v. Monroe Union Oil Co., 260 N. Y. 276; 185 S. B. 317; McGuckin v. Baker Estate, 262 N. Y. 545; 185 S. B. 306; Nieder v. Busch & Son, 262 N. Y. Rep. 656; 185 S. B. 307; Langley v. Hennessey, 265 N. Y. Rep. 529; 185 S. B. 321; Kellerman v. Most, 261 N. Y. Rep. 678; 185 S. B. 306; Wedemeier v. Mavis Bottling Co., 261 N. Y. Rep. 548; 185 S. B. 319; Lind v. Roberts, 261 N. Y. Rep. 626; 185 S. B. 321; Keller v. Sherwood, 259 N. Y. Rep. 640; 185 S. B. 317; Lent v. 850 Seventh Avenue Corp., 259 N. Y. Rep. 616; 185 S. B. 316; MacDonald v. G. B. & I. Service, 254 N. Y. Rep. 605; 185 S. B. 312; Collier v. Dangard, 256 N. Y. Rep. 561; 185 S. B. 314; Hall v. Howe Bros., 232 App. Div. 860; 10 Ind. Bul. 197; Ezeckel v. Saperstein, 231 App. Div. 771; 185 S. B. 307; Buccos v. Moran, 231 App. Div. 773; 10 Ind. Bul. 63; Decker v. Rosenweig Co., 231 App. Div. 784; 10 Ind. Bul. 63; Day v. McClintic-Marshall Co., 215 App. Div. 733; 149 S. B. 231; Schweizer v. Schreiner, 9 S. D. R. 337; 178 App. Div. 945; 95 S. B. 238; Connolly v. Tucker Electrical Construction Co., Case No. 9217; —— App. Div. ——; 14 S. D. R. 716; 3 Bul. 119; 184 App. Div. 921; 95 S. B. 238; O'Shaughnessy v. Empire Construction Co., 16 S. D. R. 467; 186 App. Div. 927; 95 S. B. 238; Neubeck v. Doscher, 204 App. Div. 617; 209 App. Div. 843; 129 Misc. 466; 123 S. B. 66; 133 S. B. 203; Astrin v. East N. Y. Woodwork Mfg. Co., 210 App. Div. 720; 133 S. B. 204; Levine v. East N. Y. Electric Corp., 210 App. Div. 730; 133 S. B. 206; Szabo v. Standard Commercial Body Corp., 221 App. Div. 722; 156 S. B. 242. Compare also Hungerford v. Bonn, 14 S. D. R. 720; 3 Bul. 121; 183 App. Div. 818; 95 S. B. 239; Aprea v. David & Co., 16 S. D. R. 489; 3 Bul. 195 and Fagnani and Finlay v. Empire Construction Co., 16 S. D. R. 464, 17 S. D. R. 607; 186 App. Div. 926, 927; 95 S. B. 239.

The Court of Appeals held a corporation's carrier liable for injury to an em-

ployee engaged in carpentry at its plant and detailed by its foreman to a carpentry job at its manager's private residence: Jaabeck v. Crane's Sons Co., 238 N. Y. 314; 133 S. B. 196; but held a coal, wood and lumber corporation's carrier not liable for injury to its tenant while working out his rent by carpentry work at its president's private residence: Nieder v. Busch & Son, Inc., 262 N. Y. Rep. 656; 185 S. B. 307; terms of the insurance policies were decisive in the two cases; see also Griffin v. Becker Roofing Co., 249 N. Y. Rep. 523; 161 S. B. 187; Twitchell v. Wagner Productions, 255 N. Y. Rep. 612; 177 S. B. 93; and citations of 162 S. B. 153, 154.

Other insurance contract cases are: Clemens v. Clemens & Grell, 180 App. Div. 92; 95 S. B. 381; Sayers v. Bill, Bell & Co., Claim No. 17931; 8 S. D. R. 393; 176 App. Div. 938; 181 App. Div. 907; 184 App. Div. 923; 95 S. B. 188, 236, 241; Herald v. Cohen & Symansky, Claim No. 26892; 186 App. Div. 933; 95 S. B. 240, 241; London Guarantee & Accident Co. v. Marine Repair Corp., 120 Misc. 596; 123 S. B. 70; Jennings v. Visscher, 217 App. Div. 417; 149 S. B. 228; Camárdi v. Snare & Triest, 4 Bul. 29; and Jolly v. Cantilever Aeroplane Co., 5 Bul. 183.

Legal expenses of an employer in a case where it conceded a claimant's right to compensation but the carrier contested the coverage of its policy were deemed incurred to enforce the insurance contract and not to defend the claimant's claim. They were not allowed as a counterclaim in an action for collection of insurance premiums: Great American Indemnity Co. Inc. v. Audlane Realty Corp., 163 Misc. 301; 16 Ind. Bul. 315.

The liquidator of an insurance company's business should admit claims based on awards of other States upon an equal footing with claims based upon awards by the company's home State. He is not entitled to possession of a deposit made by the company with a foreign State to secure payment of claims against it. Distribution of such deposit by the foreign State does not debar awards by the foreign State from participation in the liquidation proceedings: Casualty Co. of America (Mackey Claim), Matter of, 206 App. Div. 314; 123 S. B. 73.

For citation on the subject, "Insurers and insurance," see 162 S. B. 262, 263, and 204 S. B. 501–537.

§ 54-a. **Security where coverage is in issue.** Where the issue of policy coverage is raised by a carrier in any hearing or proceeding before the industrial board, and an appeal by the carrier, or the making of an application for review is made, although an award is made to a claimant therein against the employer and carrier, the industrial commissioner may, nevertheless, require the employer to deposit the amount of said award or furnish such security therefor as may be deemed satisfactory by said industrial commissioner. If the employer shall fail to make such deposit or give such security, the award may be enforced promptly against said employer by the entry of judgment by and in the name of the industrial commissioner, for and in behalf of such claimant in accordance with the provisions of section twenty-six hereof. In the event that the award made as against the carrier is finally affirmed, the employer shall be entitled to the return of said security deposited or, if the said award has been paid, to an award by way of reimbursement against the said carrier for the amount of money paid upon the award or judgment entered thereon to the claimant. If the award against the carrier is finally reversed on appeal, then the carrier is relieved of liability and not otherwise. [§ 54-*a added by L.* 1935, *ch.* 780.]

§ 54-b. *In the event of the failure of a carrier or self-insurer to pay an award after the expiration of thirty days from the entry thereof, from which award or decision in connection therewith no appeal has been taken as provided by law, the industrial commissioner may enforce the payment of said award against the carrier or self-insurer by the entry of judgment in accordance with the provisions hereof and section twenty-six. Where, however, the carrier or self-insurer has taken an appeal and the award or decision in connection therewith has been finally affirmed, as provided by law, and no rehearing has been ordered by the industrial board herein, if such award and accrued costs and interest are not paid within thirty days after the entry of a final order by the court of last resort, the industrial commissioner may enforce, in like manner, payment against such carrier or self-insurer of all sums of money due thereon. [§ 54-*b added by L.* 1935, *ch.* 649.]

§ 55. **Acceptance of premium by carrier an estoppel.** Acceptance of a premium on a policy securing to an employee compensation, either alone or in connection with other insurance, shall estop the carrier so accepting from pleading that the employment of such employee is not a hazardous employment or the employment is not carried on for pecuniary gain. [*As added by L.* 1922, *ch.* 615.]

Compare § 3, subd. 1, gr. 19, above. Court interpretation of the pecuniary gain limitation is reviewed under § 2, subd. 5. Cases illustrating use of this section are: Bernstein v. Beth Israel Hospital, 236 N. Y. 268; 133 S. B. 99; Shererd v. Village of Warsaw, 30 S. D. R. 453; 209 App. Div. 841; 133 S. B. 50; Fostner v. Morawitz, 211 App. Div. 824; 133 S. B. 32; 140 S. B. 32, 142; and Romer v. Delafield, 30 S. D. R. 414; 133 S. B. 99.

§ 56. **Subcontractors.** A contractor, the subject of whose contract is, involves or includes a hazardous employment, who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured whose injury arises out of and in the course of such hazardous employment, unless the subcontractor primarily liable therefor has secured compensation for [1]injuries to all employees employed to perform work under the subcontract as provided in this chapter.

[2]Any contractor, or his insurance carrier, who shall become liable for the payment of compensation to any employee or the dependents of a deceased employee of his subcontractor, pursuant to provisions of this section, may recover the amount of such compensation paid or for which liability is incurred from the subcontractor primarily liable for such compensation to the injured employee or his dependents. The claim for such recovery shall constitute a lien against any moneys due or to become due to the subcontractor from such general contractor. Such claim for recovery, however, shall not affect the right of the injured employee, or the dependents of a deceased employee, from recov-

* So in original; no side title.

ering compensation due from the general contractor or his insurance carrier.

An owner of timber other than farm lands, who contracts with another to carry on or perform work or service in connection therewith, which work or service is, involves or includes a hazardous employment, shall be liable for and shall pay compensation to any employee of such contractor, or his subcontractor, if any, injured in the course of and arising out of such hazardous employment, unless the contractor, or the subcontractor, if any, primarily liable therefor has secured compensation for [3]all employees as provided in this chapter. [*Section* 56 *added by L.* 1922, *ch.* 615; *am'd by L.* 1929, *ch.* 302; *L.* 1939, *ch.* 541.]

[1] Words "injuries . . . the subcontract" substituted for words "such employee so injured" by L. 1939, ch. 541.

[2] Words "Any contractor . . . general contractor or his insurance carrier" inserted by L. 1929, ch. 302.

[3] Words "all employees" substituted for words "such employee so injured" by L. 1939, ch. 541.

Compare § 2, subd. 3, and §§ 11 and 29, above.

CONSTITUTIONALITY

This § 56 is constitutional: Anttonen v. Laakso Builders, 261 N. Y. Rep. 545; 188 S. B. 168.

CONTRACTORS' LIABILITY TO SUBCONTRACTORS' EMPLOYEES

The general contractor's liability under § 56 is secondary and contingent. If the subcontractor carries insurance upon his injured employee, such employee may sue the general contractor as a third party: Clark v. Monarch Engineering Co., 248 N. Y. 107; 156 S. B. 116; Lumsden v. Robinson & Co., 248 N. Y. Rep. 529; 156 S. B. 117; Casey v. Shane, 248 N. Y. Rep. 625; 161 S. B. 85. If neither general contractor nor subcontractor carries compensation insurance, the employee may elect remedy against either or both of them under § 11, above. This section does not apply as between a subcontractor and an employee of another subcontractor: Portman v. Hanman Bldg. Corp. & Reiss, 131 Misc. 168; 156 S. B. 124. If a general contractor is liable for injury to a subcontractor's employee under this § 56, its carrier is also liable only in case the policy specifically includes the subcontractor's employees: Passarelli v. Columbia E. & C. Co., 270 N. Y. 68; 204 S. B. 539; Monello v. Klein, 216 App. Div. 105; 149 S. B. 32; Haskins v. Calasuonno & Labrillie, 217 App. Div. 808; 156 S. B. 37. The courts affirmed awards against general contractors together with their carriers in Goldstein v. Eidlitz & Son, 264 N. Y. Rep. 508; 185 S. B. 262; Sciachitano v. Spencer Forbes, Inc., and Chiarello, 241 App. Div. 641; 185 S. B. 257; Ucciardino v. Tri-Boro Asphalt Co., 266 N. Y. Rep. 560; 185 S. B. 262; Basset v. Van de Bogart & Decker, 221 App. Div. 606; 156 S. B. 38; Skora v. Conservative Bldg. Corp., 223 App. Div. 799; 156 S. B. 38; and Waitkiene v. Blair, 238 App. Div. 885; 12 Ind. Bul. 83. The Court of Appeals reversed the order and dismissed the claim in the Skora case because the employer was not a contractor (249 N. Y. Rep. 519; 161 S. B. 189); and reversed the order and remitted the claim in the Sciachitano case because the subcontractor had insurance with an insolvent carrier (264 N. Y. 324; 185 S. B. 257). Prior to enactment of this section, the court held a general contractor liable as a third party in Greenberg v. Sommer, 216 App. Div. 416; 149 S. B. 243.

Laws of 1939, ch. 404, amended subd. 4 of § 54, above, to provide that every contract of workmen's compensation insurance shall be deemed to include the employees for whose injuries a contractor may become liable under the provisions of this § 56.

This section applies to the clothing industry and industries other than the building industry as well: Opinion of Attorney-General, June 5, 1936.

The courts affirmed award against a New York city school building custodian, as general contractor under this § 56, for injury to a window washer: Bederman v. McNamara, 268 N. Y. Rep. 510; 185 S. B. 253.

A general contractor is liable under this § 56 for compensation to his sub-subcontractor's employee if such sub-subcontractor carries no insurance, unless the intermediate subcontractor carries insurance, in which case the subcontractor is liable: Passarelli v. Baker & Yettman, Columbia Engineering & Contracting Co., and Others, 241 App. Div. 639; 244 App. Div. 850; 185 S. B. 263; 270 N. Y. 68; 204 S. B. 539. See also Garelick v. Rosen, 274 N. Y. 64 and Orlando v. Rosen, 274 N. Y. Rep. 472; 204 S. B. 515.

A contractor was held not liable for payments into the special funds of §§ 15 and 25-a where an employee of its uninsured subcontractor was killed in the course of his employment, leaving no dependents: Holblock v. Riger Bldg. Corp., ex rel., 260 App. Div. 358; 285 N. Y. 217.

Lumbering

For arguments in timber contract cases under this § 56, see Lobdell v. Ervay, 262 N. Y. Rep. 529; 185 S. B. 261; Arnink v. Caflish, 232 App. Div. 713; 10 Ind. Bul. 126.

Purchaser of timber was held liable for compensation to log skidder in employ of the farmer with whom he had contracted for the sale and skidding of the timber: Foster v. Fitzpatrick & Weller, 253 App. Div. 854; 204 S. B. 542.

§ 57. [1]**The head of a state or municipal** department, board, commission or office authorized or required by law to issue any permit for or in connection with any work involving the employment of employees in a hazardous employment defined by this chapter, and notwithstanding any general or special statute requiring or authorizing the issue of such permits, shall not issue such permit [2]unless [3]proof [4]under oath is produced [5]in a form satisfactory to the industrial commissioner, that compensation [6]for all employees has been secured as provided by this chapter. Nothing herein, however, shall be construed as creating any liability on the part of such state or municipal department, board, commission or office to pay any compensation to any such employee if so employed. [*As added by L.* 1922, *ch.* 615; *am'd by L.* 1932, *ch.* 201; *L.* 1939, *ch.* 541.]

[1] Side title "Restriction on issue of permits unless compensation is secured" omitted by L. 1932, ch. 201.

[2] Words "to the employer" stricken out by L. 1939, ch. 541.

[3] Word "satisfactory" in phrase "such employer shall produce satisfactory proof" stricken out by L. 1932, ch. 201; words "employer shall produce" stricken out by L. 1939, ch. 541.

[4] Words "under oath is produced" inserted by L. 1939, ch. 541.

[5] Words "in a form satisfactory to the industrial commissioner" inserted by L. 1932, ch. 201.

[6] Words "for all employees" inserted by L. 1939, ch. 541.

Contracts for public works must contain the stipulation for workmen's compensation insurance required by the General Municipal Law, § 90, and the State Finance Law, § 142.

A city may not require a state institution within its limits to comply with this section: Opinion of Attorney-General, December 28, 1922.

Section 210 of the Labor Law can be invoked as to officers or employees of a municipal corporation who fail to carry out the provisions of this section: Opinion of Attorney-General, November 6, 1937.

ARTICLE 4-A

Silicosis, and Other Dust Diseases

[*This Article 4-A inserted by L.* 1936, *Ch.* 887, *effective June* 6, 1936.]

Section 65. Prevention of silicosis and other dust diseases.
66. Compensation payable for disability or death.
67. Liability of employer.
68. Medical treatment and care.
69. Workers, when not entitled.
70. Special medical examiners.
71. Expert consultants.
72. Alternate remedy.

§ 65. **Prevention of silicosis and other dust diseases.** 1. It is hereby declared to be the policy of the legislature of this state, in enacting this article, to prohibit through every lawful means available, any requirement as a pre-requisite to employment which compels an applicant for employment in any occupation coming within the purview of this article to undergo a medical examination.

2. The [1]board [2]of standards and appeals [3]is hereby required to add to the industrial code, as provided in sections twenty-eight and twenty-nine of the labor law, effective rules and regulations governing the installation, maintenance and effective operation in all industries and operations wherein silica dust or other harmful dust hazard is present, of approved devices designed to eliminate such harmful dusts and to promulgate such other regulations as will effectively control the incidence of silicosis and similar diseases. [*As am'd by L.* 1938, *ch.* 657.]

[1] Words "industrial commissioner and the industrial" stricken out by L. 1938, ch. 657.
[2] Words "of standards and appeals" inserted by L. 1938, ch. 657.
[3] Word "is" substituted for word "are" by L. 1938, ch. 657.

§ 66. **Compensation payable for disability or death.** Compensation shall not be payable for partial disability due to silicosis or other dust disease. In the event of temporary or permanent total disability or death from silicosis or other dust disease, notwithstanding any other provision of this chapter, compensation shall be payable under this article to employees in the employments enumerated in section three of this chapter or to their dependents in the following manner and amounts: If disablement or death occur during [1]June, nineteen hundred thirty-six, not exceeding the sum of five hundred dollars; [2]thereafter the total of compensation and benefits payable for disability and death shall increase at the rate of fifty dollars each calendar month [3]until and including the month of December, nineteen hundred forty-three. The aggregate amount payable shall be determined by the total amount payable in the month in which disablement or death

occurs. In no event shall such compensation exceed an aggregate total of [4]five thousand dollars. The requirement as to payments into the special funds provided for in subdivisions eight and nine of section fifteen for each case of injury causing death in which there are no persons entitled to compensation shall not apply to any claim arising under this article.

Compensation payable hereunder shall be paid from the eighth day following total disablement at the rate of sixty-six and two-thirds per centum of the average weekly wage to be computed under section fourteen of this chapter; but in no case shall compensation exceed twenty-five dollars per week nor in the event of total disability be less than eight dollars per week; provided, however, that in the event of death from such disease his dependents shall receive, in the manner provided by sections sixteen and seventeen of this chapter, any balance remaining between the amounts paid for disability and the total compensation payable under this article.

Notwithstanding the provisions of section twenty-eight of this chapter, all claims for compensation resulting from inhalation of harmful dust, where the last exposure occurred between[5] September first, nineteen hundred and thirty-five, [6]and June sixth, nineteen hundred thirty-six, shall be barred unless filed within one hundred and eighty days from [7]June sixth, nineteen hundred thirty-six. Liability in damages for disability or death due to any disease described in article four-a of this chapter, in any case in which there was injurious exposure to the hazards of the disease prior to, and any exposure to such hazards subsequent to, September first, nineteen hundred thirty-five, shall be forever barred unless action therefor be begun within ninety days from the effective date of this act. [8]In addition to compensation herein provided, reasonable funeral expenses shall be paid as provided by subdivision one of section sixteen. [*As am'd by L.* 1937, *ch.* 271; *L.* 1940, *ch.* 548.]

[1] Words "June, nineteen hundred and thirty-six" substituted for words "the first calendar month in which this act becomes effective" by L. 1940, ch. 548.

[2] Words "if disablement or death occur during the second calendar month after which this act becomes effective not exceeding the sum of five hundred and fifty dollars" stricken out by L. 1940, ch. 548.

[3] Words "until and . . . forty-three" inserted by L. 1940, ch. 548.

[4] Word "five" substituted for word "three" by L. 1940, ch. 548.

[5] Words "the effective date of this act and" stricken out by L. 1940, ch. 548.

[6] Words "and June sixth, nineteen hundred thirty-six" inserted by L. 1940, ch. 548.

[7] Words "June sixth . . . effective date of this act" inserted by L. 1940, ch. 548.

[8] Concluding sentence added by L. 1937, ch. 271.

CONSTITUTIONALITY. Contention that the provision in section 66 that, "Compensation shall not be payable for partial disability due to silicosis or other dust disease" is unconstitutional under the Fourteenth Amendment to the United States Constitution and Article I, section 6, of the State Constitution, held without merit. Burden of partial disability was placed on the employee in return for compensation allowed for total disability. Contention that partially disabled employee was left right of action at common law, rejected. Del Busto v. Dupont de Nemours & Co., 167 Misc. 920; 259 App. Div. 1070; 204 S. B. 545. See also Powers v. Porcelain Insulator Corp., 285 N. Y. 54.

OCCUPATIONAL DISEASE AWARD VERSUS DUST DISEASE AWARD. Moulder who was exposed to free silica, fumes and gas in his employment became disabled as a result of tuberculosis superimposed upon a pulmonary fibrosis. Industrial Board's finding that the disabling disease was not a dust disease but one covered by the provisions of § 3, Subd. 2, Par. 28 of the Workmen's Compensation Law was affirmed. Huffman v. Cast Traffic Sign Corp., 258 App. Div. 1013; 204 S. B. 207.

§ 67. **Liability of employer.** An employer shall be liable for the payments prescribed by this article for silicosis or other dust disease when disability of an employee resulting in loss of earnings shall be due to an employment in a hazardous occupation in which he was employed, and such disability results within one year after the last injurious exposure in such employment; or, in case of death resulting from such exposure, if such death occurs within five years following continuous disability from such disease. The provisions of section forty-four of this chapter shall not apply to claims arising under this article.

The employer in whose employment the employee was last injuriously exposed in a hazardous occupation and the insurance carrier, if any, which was on the risk at the time of the last injurious exposure in such employment, shall be liable for any payments required by this article; the notice of injury and claim shall be made to such employer.

[1]Any exposure to the hazards of harmful dust in this state for a period of sixty days after September first, nineteen hundred thirty-five, shall be presumed, in the absence of substantial evidence to the contrary, to be an injurious exposure. [*As am'd by L.* 1940, *ch.* 548.]

[1] This paragraph added by L. 1940, ch. 548.

§ 68. **Medical treatment and [1]hospital care.** Notwithstanding any other provisions of this chapter the medical treatment herein provided for [2]or, in lieu thereof, such hospitalization as the board may allow, shall be limited in the case of an employee disabled by an occupational disease due to or resulting from the inhalation of harmful dust to a period of ninety days [3]from the date of such disablement, but the requirement for such medical treatment [4]or hospitalization may be extended for an additional period, [5]not necessarily continuous, not to exceed [6]three hundred and sixty days upon the order of the industrial board.

[7]In determining the medical treatment, hospitalization, and other care required beyond the period of ninety days from the date of disablement, the board shall consider the recommendations contained in the report submitted by the committee of expert consultants as required under the provisions of section seventy-one of this chapter.

Copies of the order of the board directing the claimant as to the proper type of treatment, hospitalization and other care to be secured shall be sent to all parties in interest and also to the attend-

ing physician and medical director of any hospital, sanatorium or other place in which the treatment or care is being given. No claim for such treatment or care not in accordance with the requirements of the order of the board shall be valid and enforceable for any period more than five days after such notice of direction and report shall have been sent. [*As am'd by L.* 1939, *ch.* 676; *L.* 1940, *ch.* 548.]

[1] Word "hospital" inserted by L. 1939, ch. 676.
[2] Words "or, in lieu . . . may allow" inserted by L. 1939, ch. 676.
[3] Words "not necessarily continuous" inserted by L. 1939, ch. 676, stricken out by L. 1940, ch. 548.
[4] Words "or hospitalization" inserted by L. 1939, ch. 676.
[5] Words "not necessarily continuous" inserted by L. 1939, ch. 676.
[6] Words "three hundred and sixty" substituted for words "one hundred and eighty" by L. 1940, ch. 548; words "one hundred and eighty" had been substituted for word "ninety" by L. 1939, ch. 676.
[7] Remainder of this section added by L. 1940, ch. 548.

§ 69. **Workers, when not entitled.** If an employee, at the time of his employment, falsely represents in writing that he has not previously been disabled from the disease which is the cause of disability or death or has not received compensation or benefits under this article, no compensation shall be payable.

§ 70. **Special medical examiners.** The industrial commissioner shall divide the state into five districts and in each district may appoint two or more special medical examiners who shall be licensed physicians in good professional standing, each of whom shall have had, at the time of his appointment, and immediately prior thereto, at least five years of practice in the diagnosis, care and treatment of pulmonary diseases. Such examiners shall be employed on a per diem basis as the exigencies of the work may require. Fees of examiners shall be fixed by the industrial commissioner within the limits of the appropriation therefor. Each position of special medical examiner provided herein shall be in the exempt class of civil service.

Whenever a claim is made under this article and an examination of the claimant by an impartial physician is desired by any party in interest, the industrial commissioner shall order such medical examiners to make the necessary medical and x-ray examination of the claimant in an effort to obtain the medical facts in an impartial manner.

For the purposes of adjudication under this chapter, the industrial board shall adopt rules of practice and procedure and shall prescribe methods and standards under which physical examinations, x-rays and other studies shall be conducted.

§ 71. **Expert consultants.** The industrial commissioner shall appoint as [1]a committee of expert consultants on dust diseases three licensed physicians in good professional standing, each of whom

shall have had, at the time of his appointment, and immediately prior thereto, at least ten years of practice in the diagnosis, care and treatment of diseases of the pulmonary tract, along with interpretation of x-ray films thereof. [2]One of such committee shall be designated by the commissioner as chairman. They shall [3]each be paid [4]a salary [5]of seven thousand five hundred dollars per year. Each such position of consultant shall be in the exempt class of civil service.

[6]As soon as practicable after the filing of a claim for compensation hereunder, or notice thereof, the commissioner shall direct an examination of the claimant by the committee of expert consultants, or one of them, including such x-ray and other pathological examinations and tests as in their opinion may be necessary for the purpose of determining diagnosis, disablement, causal relation to the employment and the nature and type of medical treatment, hospitalization and other care required. In the event that the claim is not controverted as to any medical fact, the examination and report of one member of the committee of expert consultants shall be deemed the examination and report of the committee. In the event that the claim is controverted upon any medical ground, the report shall be made by the full committee after a physical examination by at least one such expert consultant. The findings and opinions of a majority of the committee of expert consultants shall constitute the findings and opinion of the committee. The contents of such report of the committee of expert consultants introduced in evidence shall constitute prima facie evidence of fact as to the matter contained therein, and any of the makers of such report shall be subject to examination upon demand.

Copies of the report shall be sent to all parties in interest and also to the attending physician and medical director of any hospital, sanatorium or other place in which treatment or care is being given.

Such expert consultants, or any of them, to assist in reaching a conclusion as to the care and treatment needed shall have the right to require the attending physician or medical director of any hospital or sanatorium or other place in which treatment or care provided for by this section is being given, to attend at such time or place as may be reasonably convenient, to consult with such expert consultants, or any of them, and to describe the nature and type of care or treatment being rendered, and for such attendance shall be entitled to receive a fee from the employer, or carrier, in an amount to be fixed by the commissioner in addition to any fee payable under section one hundred twenty.

In the event of a claim for death benefits, the committee of expert consultants upon their own initiative or upon the order of the commissioner or the board shall examine all available evidence pertaining to such claim, including medical and hospital records, x-rays and other reports made during the lifetime of the deceased, includ-

ing the findings of any autopsy, and shall render its findings and report thereon.

The industrial commissioner or the industrial board shall on their own volition or on the application of either an employee, an employer, or an insurance carrier, direct such expert consultants to make examinations of claimants, to review the findings of special medical examiners, to read and review the files of compensation cases when necessary, and to inform the industrial commissioner and the industrial board of their opinion as to their findings in such cases. [*As am'd by L.* 1940, *ch.* 548.]

[1] Words "a committee of" inserted by L. 1940, ch. 548.
[2] Following sentence inserted by L. 1940, ch. 548.
[3] Word "each" inserted by L. 1940, ch. 548.
[4] Word "at" eliminated by L. 1940, ch. 548.
[5] Words "to be fixed by the industrial commissioner not to exceed" stricken out and word "of" inserted by L. 1940, ch. 548.
[6] Following four paragraphs inserted by L. 1940, ch. 548.

§ 72. **Alternative remedy.** The liability of an employer prescribed by this article shall be exclusive and in place of any other liability whatsoever, at common law or otherwise, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law, or otherwise on account of any injury, disability, or death, caused by the inhalation of harmful dust, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury or disease, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury or disease; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury or disease was caused by the negligence of a fellow servant or that the employee assumed the risk of his employment, nor that the injury or disease was due to the contributory negligence of the employee.

Re exclusiveness of remedy, see Del Busto v. Dupont de Nemours & Co., 167 Misc. 920; 259 App. Div. 1070; 204 S. B. 543.

ARTICLE 6

State Insurance Fund

[*This Article* 6, *formerly Article* 5, *was renumbered by L.* 1935, *ch.* 255, § 2. *Former* § 90 *was renumbered* § 76, *new* §§ 77 *to* 84 *were inserted, former* §§ 91 *to* 105 *were renumbered* §§ 88 *to* 99 *and* § 106 *was repealed by L.* 1938, *ch.* 585.]

Section 76. Creation of state fund.
77. Administration.
78. Salaries and expenses.
79. Meetings.
80. Seal.
81. Offices.
82. Powers and duties.
83. Rules.
84. General attorney.
85. Commissioner of taxation and finance custodian of fund.
86. Catastrophe surplus and reserves.
87. Investment of surplus or reserve.
88. Administration expenses.
88-a. Payments from special or administrative funds
89. Rates.
90. Dividends.
91. Groups for accident prevention.
92. Payment of premiums.
93. Collection of premium in case of default.
94. Withdrawal from fund.
95. Record and audit of payrolls.
96. Wilful misrepresentation.
97. Inspections.
98. Disclosures prohibited.
99. Reports of state insurance fund; examination by insurance department.
* 106. Advisory committee.

§ [1]76. **Creation of state fund.** There is hereby [2]continued in the department of labor a fund [3]known as "the state insurance fund," for the purpose of insuring employers against liability [4]for personal injuries or death sustained by their employees and of assuring to the persons entitled thereto the compensation [5]and benefits provided by this chapter [6]or by any act providing for compensation now or hereafter enacted by the congress of the United States of America if such liability is incident to an employment carried on in this state. Such fund shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided. [7]Such fund shall be applicable to the payment of losses sustained on account of insurance, [8]to the payment of expenses in the manner provided

* Repealed by L. 1938, ch. 585.

in this chapter [9]and to the payment of premiums for reinsurance in any insurance corporation of the whole or any part of any policy obligations.[10] [*As am'd by L.* 1922, *ch.* 615; *L.* 1928, *ch.* 750; *L.* 1935, *ch.* 793; *and L.* 1938, *ch.* 585.]

[1] This § 76, formerly § 90, renumbered by L. 1938, ch. 585.

[2] Words "continued in the department of labor" substituted for word "created" by L. 1938, ch. 585.

[3] Words "to be" stricken out by L. 1938, ch. 585.

[4] Words "for personal injuries or death sustained by their employees" substitutd by L. 1928, ch. 750, for words "under this chapter."

[5] Words "and benefits" inserted by L. 1928, ch. 750.

[6] Words "or by any . . . in this state" inserted by L. 1928, ch. 750.

[7] Sentence "Such fund shall be administered by the commission without liability on the part of the state beyond the amount of such fund," stricken out by L. 1922, ch. 615. Compare § 53, above.

[8] Word "and" stricken out by L. 1935, ch. 793, without replacement by comma.

[9] Words "and to . . . policy obligation" inserted by L. 1935, ch. 793.

[10] Word "obligations" substituted for word "obligation"; sentence "Such fund shall be administered by the industrial commissioner," stricken out by L. 1938, ch. 585, had been added by L. 1922, ch. 615.

The Act of Congress pointed to by this section is the "Longshoremen's and Harbor Worker's Compensation Act" which became a law March 4, 1927.

For provisions of the Workmen's Compensation Law elsewhere than in this Article 6, see definition of "state fund," § 2, subd. 10; appeals, § 23 and note thereunder; costs and fees, § 24, note; custody of aggregate trust fund, § 27; security of compensation, § 50, subd. 1; release of assured employers from liability, § 53; cancellation of policies, § 54, subd. 5. For latest annual report of the State Fund, see Report of Industrial Commissioner.

The State Insurance Fund is a "state agency" and its premiums, securities and earned interest are "state moneys": Cahill v. Tremaine, 269 N. Y. Rep. 573; to all intents and purposes its employees are state employees: Opinion of Attorney-General, January 15, 1936; the State insures all of its employees in the State Insurance Fund, the legislature appropriating the premium annually. For coverage of state employees see, above, § 3, subd. 1, gr. 16, and notes thereunder.

In a claim for recovery of excess premiums paid to the State Insurance Fund, the Court of Claims held that the State is liable for damages caused by the Fund in the same measure as it is liable for damages caused by any other bureau of the State and that since the Legislature has not consented to suits being brought against the Fund, the Fund may not be sued: Sadigur v. State of New York, 173 Misc. 645; 204 S. B. 546.

This section does not empower the State Insurance Fund to write insurance under the workmen's compensation law of New Jersey; therefore, it cannot fully cover the Port of New York Authority: Opinion of Attorney-General, April 21, 1934.

§ 77. **Administration.** The state insurance fund shall be administered by the commissioners of the state insurance fund, of whom there shall be eight. The industrial commissioner shall be a commissioner of such fund by virtue of his office. The commissioners shall elect annually from the appointive members a chairman and a vice-chairman who shall act as chairman in the absence of the chairman. The industrial commissioner may designate a deputy commissioner to act in his place and stead as a commissioner of such fund. The commissioners shall be appointed by the governor, by and with the advice and consent of the senate. They shall

be employers or executive officers of employers insured in the state fund. The commissioners shall be appointed for terms of three years each, except that of the commissioners first appointed, three shall be appointed for a term ending December thirty-first, nineteen hundred thirty-nine; three shall be appointed for a term ending December thirty-first, nineteen hundred forty; and two shall be appointed for a term ending December thirty-first, nineteen hundred forty-one. They shall serve until their successors are appointed and have qualified. Vacancies shall be filled for the unexpired terms. Each commissioner shall before entering upon his duties, take and subscribe the constitutional oath of office which shall be filed in the office of the secretary of state.[1] [*Added by L.* 1938, *ch.* 585; *am'd by L.* 1940, *ch.* 360.]

[1] Words "The office of manager of the state insurance fund and the advisory committee of the state insurance fund as presently existing are hereby abolished" eliminated by L. 1940, ch. 360.

§ 78. **Salaries and expenses.** The commissioners shall be entitled to receive as and for their compensation twenty-five dollars per diem for each day actually spent in attendance upon meetings of the commission or on the business thereof, together with their actual and necessary traveling and other expenses incurred in [1]connection with their attendance upon meetings or the business of the fund, which shall be paid out of the fund upon the warrant of the [2]chairman of the commissioners or of the vice-chairman.[3] No commissioner, [4]except the chairman, shall receive as compensation for his services an amount exceeding one thousand dollars in any one year. [5]The compensation for the services of the chairman shall not exceed in amount the sum of two thousand five hundred dollars in any one year. [*Added by L.* 1938, *ch.* 585; *am'd by L.* 1939, *ch.* 251; *L.* 1940, *ch.* 360.]

[1] Word "connection" substituted for word "connections" by L. 1939, ch. 251.
[2] Words "chairman of the commissioners" substituted for words "industrial commissioner" by L. 1939, ch. 251.
[3] Words "in his absence" eliminated by L. 1939, ch. 251.
[4] Words "except the chairman" inserted by L. 1940, ch. 360.
[5] Following sentence added by L. 1940, ch. 360.

§ 79. **Meetings.** The commissioners shall meet at least once in each month, except the month of August, and at such other times as they may determine or the business of the fund may require. Special meetings may be called by the industrial commissioner upon five days' notice, and may also be called by any two commissioners upon like notice. Minutes shall be kept of all regular and special meetings, and shall show the names of the commissioners attending, and each matter brought before the commissioners for their consideration together with the vote of each commissioner thereon. The commissioners may designate an employee of the state fund to act as secretary, and to be the custodian of the minutes and records thereof. [*Added by L.* 1938, *ch.* 585.]

§ 80. **Seal.** The commissioners shall adopt a seal and shall require it to be used for the authentication of records and documents as may be necessary and proper. [*Added by L.* 1938, *ch.* 585.]

§ 81. **Offices.** The commissioners may maintain the present offices of the state fund in the city of New York and in the city of Albany, and establish others at such places in the state as may be required to properly and conveniently transact the business of the fund. [*Added by L.* 1938, *ch.* 585.]

§ 82. **Powers and duties.** 1. The commissioners shall appoint, and may remove, an executive director, a deputy executive director, a general attorney, a medical director and an actuary who shall be in the exempt class of the civil service. The actuary shall be responsible directly to the commissioners. They shall also appoint, and may remove, such number of assistant directors as may in their judgment be required for the proper and expeditious conduct of the business of the fund. In the absence of the executive director the deputy executive director shall perform the duties of the executive director. The commissioners shall prescribe the duties of all administrative officers of the fund, except as they may otherwise be prescribed by law.

2. The executive director shall, subject to the direction of the commissioners, be responsible for the direction and operation of the state fund. He shall appoint, and may remove, all officers and employees of the fund, other than those required to be appointed by the commissioners, and shall prescribe their duties. He may within the limits of the budget fix salaries, and may promote employees and may transfer employees from their positions to other positions in the fund, and may abolish or consolidate positions subject to the civil service law and rules, and all removals shall be made pursuant to such rules and laws, it being the purpose and intent of this provision that the state fund shall at all times be administered with due regard to the requirements of its business affairs and its obligations under its contracts and policies in force.

3. The commissioners shall consider at all times the condition of the fund and examine into its reserves, investments and all other matters relating to its administration. They shall have access to all records and books of account, and may require the personal appearance before them and require information from any officer or employee of the fund. Information obtained by them from officers and employees of the fund and from its records with respect to the business affairs of any employer insured in the fund shall be deemed confidential unless ordered disclosed by order of the commissioners.

4. The executive director shall submit to the commissioners quarterly estimates of the amounts required for salaries and for the maintenance and expenses of the fund during the next ensuing quarter. The commissioners shall thereupon consider such estimates, and may modify or approve any such [1]estimates. [2]Estimates shall be submitted to the director of the budget at the times and in the manner set forth in section eighty-eight of this chapter. [*This subd.* 4 *am'd by L.* 1939, *ch.* 99.]

[1] Word "estimates" substituted for word "estimate" by L. 1939, ch. 99.

[2] Provision regulating time limitations upon the making of the quarterly budgetary estimates within the organization of the State Fund stricken out by L. 1939, ch. 99.

Bill drafter's memorandum. The following memorandum was appended to Ch. 99, Laws of 1939:

The budget of the State Fund to be submitted to the director of the budget is, in actual fact, the budget of the Commissioners, and the executive director, as the Commissioners' appointee whose duties are regulated by the rules and regulations of the commissioners, prepares the same for them so that there is no necessity for setting a time limit upon the making of the budget within the organization of the State Fund itself. Section 88 of the Workmen's Compensation Law requires that budgets for the State Fund must be submitted to the budget director at least 20 days prior to the first days of January, April, July and October in each year. The commissioners should have the power to regulate the time for the making of budgets by regulation subject only to the provisions of section 88.

5. All statistics and other documentary matter filed with the state fund, except where the further retention of such statistics and other documentary matter is made necessary by requirements of law, may be destroyed by the commissioners after the expiration of six years from the filing thereof. [*This subd.* 5 *added by L.* 1941, *ch.* 222; *this* § 82 *added by L.* 1938, *ch.* 585.]

§ 83. **Rules.** The commissioners shall adopt rules for the conduct of the business of the state fund, and may from time to time alter, amend or repeal any rule therefore* adopted. At least four affirmative votes shall be required for the adoption of any rule, or the amendment or repeal of any rule. No vote shall be had on any proposal to alter, amend or repeal any rule at the meeting at which such action is proposed. No rule, and no resolution proposing to alter, amend or repeal any rule, shall be effective unless approved by the industrial commissioner. If the industrial commissioner fail to act upon any such rule or resolution within thirty days after such rule or resolution be communicated to him, such rule or resolution shall be deemed to have been approved by him.

The rules of the commissioners shall provide for the conduct of the business of the state fund, including the issuance of policies and their terms and conditions, the fixing of premium rates, the keeping of records, auditing of payrolls, and the billing and collection of premiums therefor, the inspection of risks and the set-

* So in original; evidently should be "theretofore."

ting of the standards of safety, the adjustment and payment of claims and awards, and the investigation of all matters relating thereto, the medical examination of persons claiming compensation and the furnishing and supervision of medical and surgical treatment to persons injured as set forth in section thirteen of this chapter, the conduct of the legal business of the fund and the enforcement of the subrogated rights of the fund against third parties, the investment of the surplus and reserves of the fund, and the collection and analysis of statistics of payrolls, premiums, losses and expenses and the acturial† consideration thereof. [*Added by L.* 1938, *ch.* 585.]

§ 84. **General attorney.** There shall be a general attorney of the state fund. He shall have such legal and other assistants as may be required, within the limits set forth in the budget.

It shall be the duty of the general attorney to advise the commissioners and the management of the fund upon all matters of law arising in connection with any contract or policy of insurance issued by the fund, and upon any claim or award of compensation. He shall appear as the attorney of record in all suits and other proceedings to which the state fund or the commissioners thereof are parties. He shall conduct all appeals on behalf of employers insured in the fund and on behalf of the fund itself, except where there is a divergence of interest between the employer and the fund, in which case he shall appear on behalf of the fund alone. He shall prosecute all claims against third parties under the subrogated rights of the state fund, in accordance with the provisions of section twenty-nine of this chapter. He shall have the right, subject to the approval of the commissioners, to employ special counsel in matters involving special difficulty, and to provide for the payment of their compensation and expenses out of the state fund. [*Added by L.* 1938, *ch.* 585.]

§ [1]85. [2]**Commissioner of taxation and finance custodian of fund.** The [2]commissioner of taxation and finance shall be the custodian of the state insurance fund; and all disbursements therefrom shall be paid by him upon vouchers [3]signed by the [4]executive director,[5] deputy [4]executive director [6]or an assistant director authorized for that purpose by the commissioners. The [2]commissioner of taxation and finance shall give a separate and additional bond in an amount to be fixed by the governor and with sureties approved by the state comptroller conditioned for the faithful performance of his duty as custodian of the state fund. The [2]commissioner of taxation and finance may deposit any portion of the state fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the deposit of other state funds by him. Interest earned by such portion of the state insurance fund deposited by the [2]commissioner of taxation and finance shall be collected by him and placed to the credit of the

† So in original; evidently should be "actuarial."

fund. [*As am'd by L.* 1921, *ch.* 60; *L.* 1922, *ch.* 615; *L.* 1938, *ch.* 585; *L.* 1939, *ch.* 107.]

[1] This former § 91 renumbered § 85 by L. 1938, ch. 585.

[2] Words "commissioner of taxation and finance" substituted for words "State treasurer" by L. 1938, ch. 585.

[3] Word "and" stricken out by L. 1922, ch. 615.

[4] Words "executive director" substiuted for word "commissioner" by L. 1938, ch. 585.

[5] Word "or" stricken out by L. 1939, ch. 107.

[6] Words "or an assistant . . . commissioners" inserted by L. 1939, ch. 107.

Bill drafter's memorandum. The following memorandum was appended to Ch. 107, Laws of 1939:

"The present law provides that the Commissioner of Taxation and Finance as custodian of the State Fund, shall honor vouchers for disbursements signed by the executive director and deputy director of the State Insurance Fund. The Attorney-General has rendered an opinion that the provision in section 85 is explicit and precludes the delegation of any authority in that respect to any one else.

"Before the enactment of chapter 585 of the Laws of 1938, the Industrial Commissioner was the sole administrator of the State Insurance Fund and under Section 91 of the old law, now Section 85, which required that he or a deputy commissioner sign vouchers, delegated such authority to certain officers of the State Insurance Fund who were intimately familiar with the law relating thereto and the needs of the State Insurance Fund. His right to delegate such authority was predicated on Section 24 of the Labor Law. Though Chapter 585 of the Laws of 1938 continues the State Insurance Fund in the Labor Department, it nevertheless vests the administration thereof in nine commissioners, one of whom is the Industrial Commissioner by virtue of his office, but expressly limits the signing of vouchers to the executive director and deputy executive director. There has been no change in the functions of the State Fund or in the duties of the various members of its staff and such officers, who in the past under the delegated authority of the Industrial Commissioner signed the necessary vouchers, still perform the same duties and have the same responsibilities as during the administration of the Industrial Commissioner. The purpose of this amendment is to continue the practice which obtained during the administration of the Industrial Commissioner."

Relative to the State Treasurer's bond see Opinion of Attorney-General, June 10. 1927, in Report of Attorney-General for 1927, page 159; and relative to destruction of cancelled State Fund checks, Opinion of Attorney-General, February 14, 1934.

§ [1]86. [2]**Catastrophe surplus and reserves.** Ten per centum of the premiums collected from employers insured in the fund shall be set aside [3]for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars, and thereafter five per centum of such premiums, until such time as in the judgment of the [4]commissioners such surplus shall be sufficiently large to cover the catastrophe hazard. [5]Thereafter the contribution to such surplus may be reduced or discontinued conditional upon constant maintenance of a sufficient surplus to cover the catastrophe hazard. [6]Reserves shall be set up and maintained adequate to meet anticipated losses and carry all claims and policies to maturity, which reserves shall be computed in accordance with such rules as shall be approved by the superintendent of insurance. [*As am'd by L.* 1916, *ch.* 622; *L.* 1922, *ch.* 615; *L.* 1938, *ch.* 585; *L.* 1939, *ch.* 100.]

[1] This former § 92 renumbered § 86 by L. 1938, ch. 585.
[2] Word "Catastrophe" inserted by L. 1922, ch. 615.
[3] Words "by the commission" stricken out by L. 1922, ch. 615.
[4] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615; word "commissioners" substituted for word "commissioner" by L. 1939, ch. 100.
[5] Sentence "Thereafter . . . hazard" inserted by L. 1922, ch. 615.
[6] Words "Reserves shall be set up and maintained" substituted by L. 1922, ch. 615, for words "The commission shall also set up and maintain reserves."

Bill drafter's memorandum. The following memorandum was appended to Ch. 100, Laws of 1939:

"The purpose of this amendment is to conform the Section to the intent of the Legislature by the enactment of Chapter 585 of the Laws of 1938 transferring the administration of the State Insurance Fund from the Industrial Commissioner alone to a board of Commissioners of the State Insurance Fund, which includes the Industrial Commissioner. The provisions of this section involve an administrative duty which properly belongs with the commissioners of the State Insurance Fund."

The Industrial Commissioner may not reinsure excess catastrophe losses: Opinion of Attorney-General, January 9, 1933.

§ [1]87. **Investment of surplus or reserve.** Any of the surplus or reserve funds belonging to the state insurance fund may, by order of the [2]commissioners, approved by the superintendent of insurance, be invested in or loaned on the pledge of any of the securities in which [3]a savings bank may invest the moneys deposited therein as provided in subdivisions one, two, three, four, [4]five [5]and six of section two hundred and [9]thirty-five of the banking law. All such securities or evidences of indebtedness shall be placed in the hands of the [6]commissioner of taxation and finance who shall be the custodian thereof. He shall collect the principal and interest thereof, when due, and pay the same into the state insurance fund. The [6]commissioner of taxation and finance shall pay all vouchers drawn on the state insurance fund for the making of such investments when signed by the [7]executive director or deputy [7]executive director upon delivery of such securities or evidences of indebtedness to him, when there is attached to such vouchers the approval of the state superintendent of insurance. The [2]commissioners may, upon like approval of the superintendent of insurance, [8]also sell any of such securities. [*As am'd by L.* 1916, *ch.* 622; *L.* 1921, *ch.* 60; *L.* 1922, *ch.* 615; *L.* 1926, *ch.* 748; *L.* 1938, *ch.* 585; *L.* 1940, *ch.* 159.]

[1] This former § 93 renumbered § 87 by L. 1938, ch. 585.
[2] Word "commissioners" substituted for word "commissioner" by L. 1938, ch. 585.
[3] Words "a savings bank . . . banking law," substituted for words, "deposits of insurance corporations are required to be invested pursuant to section thirteen of the insurance law, or in the public stocks or bonds of any one of the United States, or in bonds and mortgages on improved uncncumbered real property in this state worth fifty per centum more than the amount loaned thereon," by L. 1922, ch. 615.
[4] Word "and" stricken out by L. 1926, ch. 748.
[5] Words "and six" inserted by L. 1926, ch. 748.
[6] Words "commissioner of taxation and finance" substituted for words "state treasurer" by L. 1938, ch. 585.

[7] Words "executive director" substituted for word "commissioner" by L. 1938, ch. 585.

[8] Word "also" inserted by L. 1938, ch. 585.

[9] Words "thirty-five" substituted for words "thirty-nine" by L. 1940, ch. 159.

Insertion of new § 25-b in the General Construction Law by L. 1933, ch. 317, enables the State Insurance Fund to invest its surplus or reserve "in a share or part of a bond and mortgage prior in lien to all other shares and parts thereof:" Opinion of Attorney-General, May 24, 1933. For earlier advice re custody and investment, see Opinions of Attorney-General, October 23, 1915, in 81 S. B. 348, and November 1, 1932, in Report of Industrial Comr., 1932, pp. 109–111; and for advice re taking title to property in case of mortgage default: Opinion of Attorney-General, March 22, 1934.

The State Banking Department issues a "List of Securities Considered Legal Investments for Savings Banks."

§ [1]88. **Administration expenses.** The entire expense of [18]administering the state insurance fund shall be paid [2]out of such fund. [3]At least twenty days prior to the first days of January, April, July and October there shall be submitted to the [4]director of the budget for [5]his approval an estimated budget of expenditures for the succeeding three months [6]having due regard to the business interests and contract obligations of the fund. There may not be expended for the state insurance fund for purposes of administration more than the amounts specified in such budget for each item of expenditure, except as authorized by the [7]director of the budget. In no case shall the amount of expenditures so authorized for an entire year exceed [8]twenty-five per centum of the earned premiums for that year. If there be [9]officers or employees of the department whose duties relate partly to the general work of the [10]department and partly to the work of the state insurance fund, and in case there is other expense which is incurred jointly on behalf of the general work of the department and the state insurance fund, an equitable apportionment of the expense shall be made [11]and the part thereof which is applicable to [12]the state insurance fund shall be chargeable thereto. [17]The expenses of the department of audit and control incurred in connection with the preaudit of expenditures of the state insurance fund, as required by section twelve-b* of the state finance law, shall be a charge against and be paid out of the moneys of the state insurance fund and there shall be included in each quarterly estimate submitted pursuant to this section an amount sufficient to pay such expenses for the period covered by such estimate. [13]The industrial commissioner shall include in his annual report to the legislature a statement of [14]the commissioners showing the expense of administering the state fund for the preceding year.[15] All appointments to positions in the state insurance fund shall be made [16]subject to civil service requirements. [*As am'd by L.* 1916, *ch.* 622; *L.* 1920, *ch.* 530; *L.* 1922, *ch.* 615; *L.* 1923, *ch.* 334; *L.* 1938, *ch.* 585; *L.* 1940, *ch.* 132.]

* Now § 111 of State Finance Law.

[1] This § 88, formerly § 94, renumbered by L. 1938, ch. 585.

[2] Words "out of such fund . . . for that year," substituted by L. 1922, ch. 615, for words "in the first instance by the state, out of moneys appropriated therefor. In the month of July, nineteen hundred and seventeen, and annually thereafter in such months, the commission shall ascertain the just amount incurred by the commission during the preceding fiscal year, in the administration of the state insurance fund, and shall refund such amount to the state treasury. The commission may, with the approval of the governor, pay directly out of its premium income such amounts in excess of those appropriated in the annual appropriation bill, as may be found necessary for the successful administration of the fund. Such amounts, however, shall not exceed in any one year the sum of twenty-five thousand dollars. Any positions created out of such fund shall be regarded as temporary in character only and shall not be continued beyond the commencement of the next fiscal year ensuing such appointment unless provision therefor is contained in the next appropriation bill."

[3] Words "At least twenty days" inserted by L. 1938, ch. 585.

[4] Words "director of the budget" substituted for words "state board of estimate and control" by L. 1938, ch. 585.

[5] Word "his" substituted for word "its" by L. 1938, ch. 585.

[6] Words "having due . . . fund" added by L. 1938, ch. 585.

[7] Words "director of the budget" substituted for words "board of estimate and control" by L. 1938, ch. 585.

[8] Word "twenty-five" substituted for word "fifteen" by L. 1923, ch. 334.

[9] Words "officers . . . relate" substituted for words "employees of the commission other than the commissioners themselves and the secretary whose time is devoted," by L. 1922, ch. 615.

[10] Word "department" substituted for word "commission" by L. 1922, ch. 615.

[11] Words "for such purpose" stricken out by L. 1922, ch. 615.

[12] Word "the" inserted by L. 1922, ch. 615.

[13] Words "The industrial . . . legislature a" substituted for words "The commission on or before the fifteenth day of January in each year shall submit to the legislature a detailed," by L. 1922. ch. 615.

[14] Words "the commissioners showing" inserted by L. 1938, ch. 585.

[15] Words "ending June thirtieth, in the form adopted by the legislature in the annual appropriation bills" stricken out by L. 1922, ch. 615.

[16] Words "as heretofore" stricken out by L. 1922, ch. 615.

[17] Following sentence inserted by L. 1940, ch. 132.

[18] Word "administering" substituted for incorrect spelling "admintering" by L. 1940, ch. 132.

For status and financial statistics of the State Insurance Fund, see Annual Report of the Industrial Commissioner.

Section 41 of the State Departments Law abolished the State Board of Estimate and Control and transferred its functions to the governor to be exercised through the executive department's division of the budget.

Compare § 126, below. The state board of estimate and control ruled that the maximum expenditure under this section includes the State Fund's contributions under § 126.

Apportionment of State Fund expenses does not warrant additions to salaries: Opinion of Attorney-General, December 5, 1923; salaries of State Fund employees should be subjected to the percentage deductions prescribed by L. 1933, ch. 211: Cahill v. Tremaine, 269 N. Y. Rep. 573; confirming Opinion of Attorney-General, May 10, 1933.

§ 88-a. **Payments from special or administrative funds.** Whenever the compensation of any employees of the state insured in the state insurance fund is paid from a special or administrative fund provided for by law, all payments to the state insurance fund for insurance premiums on account of such employees including a proportionate share of the administrative expense of the

state insurance fund on account thereof, which otherwise would be payable from the general fund of the state treasury, shall, with the approval of the director of the budget, be paid from such special or administrative fund. [*Added by L.* 1939, *ch.* 667.]

§ [1]89. **Rates.** Employments and employers in the state fund shall be divided into such groups and classes as shall be [2]equitably based upon differences of industry or hazard for the purpose of establishing premium rates, and for such purpose a system of merit rating may be employed which shall take account of the peculiar hazard of each individual risk. Premiums in the state fund shall be fixed at the lowest possible rates consistent with the maintenance of a solvent fund and of reasonable reserves and surplus. [*As drafted from former* § 95 *by L.* 1922, *ch.* 615; *am'd by L.* 1926, *ch.* 533; *and L.* 1938, *ch.* 585.]

[1] This § 89, formerly § 95, renumbered by L. 1938, ch. 585.
[2] Word "equitably" substituted for word "equitable" by L. 1926, ch. 533.

Concerning the power of the State Fund to group a single employer by himself for premium and dividend purposes, see Andrews v. Goodman, 160 Misc. 664; 204 S. B. 550; Opinion of Attorney-General, 6 S. D. R. 476; 81 S. B. 351, January 26, 1916.

§ [1]90. **Dividends.** Employments and employers insured in the state insurance fund may be divided into such groups as shall be equitable for the purpose of accounting and declaration of dividends but for the purpose of paying compensation the state fund shall be deemed one and indivisible. Separate accounts shall be kept of income and of losses and expenses incurred, including contributions to catastrophe surplus and reserves adequate to meet anticipated losses and carry all claims to maturity, for each such group. If such accounting shows a balance remaining to the credit of the group at the close of any policy period, which shall be deemed to be safely and properly so applied, there may be credited or paid to each individual member of such group such proportion of such balance as the amount of his earned premium sustains to the total earned premium of the group for the period for which the accounting is made. If any member who has withdrawn from the group would otherwise have been entitled to such a dividend, the same may be credited or paid to him. [*Substituted by L.* 1922, *ch.* 615, *for former* § 95 *and former* § 97, *subds.* 1, 3, *as am'd by L.* 1916, *ch.* 622; *renumbered by L.* 1938, *ch.* 585.]

[1] This § 90, formerly § 96, renumbered by L. 1938, ch. 585.
For advice relative to grouping of employers under this section, see Opinions of Attorney-General, November 2, 1927, and June 29, 1932.

§ [1]91. **Groups for accident prevention.** For any group established under the provisions of section [2]ninety membership in the group of any employer otherwise entitled to be admitted thereto may be conditional upon acceptance and maintenance of special

rules [3]as to administration and as to accident prevention [4]and medical care of employees. Such limitation of membership in the group may be established only upon proper evidence that a majority of the members of the group have approved such rules and only when such rules have been approved by the [5]commissioners as sufficient to constitute a proper basis of differentiation as to membership in the group. [*Substituted for former* § 96 *by L.* 1922, *ch.* 615, *and am'd by L.* 1938, *ch.* 585.]

[1] This § 91, formerly § 97, renumbered by L. 1938, ch. 585.
[2] Word "ninety" substituted for word "ninety-six" by L. 1938, ch. 585.
[3] Words "as to administration and " inserted by L. 1938, ch. 585.
[4] Word "and" substituted for word "or" by L. 1938, ch. 585.
[5] Word "commissioners" substituted for word "commissioner" by L. 1938, ch. 585.

For advice relative to grouping of employees under this section, see Opinions of Attorney-General, November 2, 1927, and June 29, 1932.

§ 92. **Payment of premiums.** Premiums for any policy period shall be paid into the state insurance fund at the beginning of the period according to the estimated expenditure of wages for the period. At the end of the period an adjustment of the premium shall be made according to the actual expenditure of wages. If such adjusted premium is more than the premium paid at the beginning of the period, the employer shall pay the difference immediately upon notification of the amount of the true premium and the difference due. If such adjusted premium is less than the premium paid in advance, the employer shall, at his option, receive either a refund of the difference or a credit of the amount thereof on his account with the state fund. [*Substituted by L.* 1922, *ch.* 615, *for former* § 97, *subds.* 2, 4, *as am'd by L.* 1917, *ch.* 705, *and former* § 98, *and renumbered by L.* 1938, *ch* 585.]

Relative to deposit premiums including among other matters that of assignment, see Opinion of Attorney-General, August 5, 1936.

§ [1]93. [2]**Collection of premium in case of default.** If an employer shall default in any payment required to be made by him to the state insurance fund [3]after due notice, his insurance in the state fund may be cancelled and the amount due from him shall be collected by civil action [4]brought against him [5]in any county wherein the state insurance fund maintains an office in the name of the [6]commissioners of the state insurance fund and the same when collected, shall be paid into the state insurance fund, and such employer's compliance with the provisions of this chapter requiring payments to be made to the state insurance fund shall date from the time of the payment of said money [7]to the state insurance fund. [*As am'd by L.* 1922, *ch.* 615; *L.* 1938, *ch.* 585; *L.* 1939, *ch.* 288.]

[1] This § 93, formerly § 99, renumbered by L. 1938, ch. 585.

[2] Words "Action for" stricken out by L. 1922, ch. 615.

[3] Words "after due . . . cancelled and" inserted by L. 1922, ch. 615.

[4] Word "brought" inserted by L. 1939, ch. 288.

[5] Words "in any . . . an office" inserted by L. 1939, ch. 288.

[6] Words "commissioners of the state insurance fund" substituted for words "industrial commissioner" by L. 1939, ch. 288; words "industrial commissioner" had been substituted by L. 1922, ch. 615, for words "people of the state of New York, and it shall be the duty of the commission on the first Monday of each month after July first, nineteen hundred and fourteen, to certify to the attorney-general of the state the names and residences, or places of business, of all employers known to the commission to be in default for such payment or payments for a longer period than five days and the amount due from such employer, and it shall then be the duty of the attorney-general forthwith to bring or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due."

[7] Words "so collected as aforesaid to the state treasurer for credit" stricken out by L. 1938, ch. 585.

Justices of the peace have cognizance of civil actions for premiums due the State Insurance Fund not exceeding two hundred dollars: Justice Court Act, § 4, subd. 1.

The State Fund may not assign accounts or employ private agencies to collect them, but may employ private counsel to bring actions for collection of them if its budget provides therefor: Opinion of Attorney-General, June 26, 1934.

§ [1]94. **Withdrawal from fund.** [2]a. Any employer may, upon complying with subdivision two or three of section fifty of this chapter, withdraw from the fund by turning in his insurance contract for cancellation, provided he [3]has given [4]written notice of his intention to withdraw [5]not less than thirty days before the expiration of the period [6]of insurance stated in his insurance contract.[8]

[7]b. Notwithstanding any of the provisions contained in subdivision five of section fifty-four of this chapter the fund may cancel a contract of insurance at any time during the contract period upon being furnished by an employer with proof satisfactory to the fund that he is no longer required to comply with section fifty of this chapter by reason of his having discontinued, sold, transferred, assigned or otherwise disposed of his business and has ceased employing workmen or operatives; or, where the insurance contract has been issued to cover the operations under a specific contract or at a specified location, that such operations have been completed or discontinued and the employment of workmen or operatives in connection therewith has ceased; provided, however, such cancellation shall not become effective until at least ten days after notice thereof shall have been filed in the office of the commissioner. [*As reenacted without change by L.* 1916, *ch.* 622; *am'd by L.* 1922, *ch.* 615; *L.* 1938, *ch.* 585; *L.* 1939, *ch.* 668.]

[1] This § 94, formerly § 100, renumbered by L. 1938, ch. 585.

[2] Paragraph letter "a" inserted by L. 1939, ch. 668.

[3] Words "is not in arrears for premiums due the fund and" eliminated by L. 1939, ch. 668.

[4] Words "to the commission" stricken out by L. 1922, ch. 615.

[5] Words "not less than" substituted for word "within" by L. 1922, ch. 615.

[6] Words "of insurance stated in his insurance contract" substituted for words "for which he has elected to insure in the fund" by L. 1939, ch. 668.

[1] Paragraph b added by L. 1939, ch. 668.

[2] Words "provided he is not in arrears for premiums due the fund and has given to the commission written notice of his intention to withdraw within thirty days before the expiration of the period for which he has elected to insure in the fund; provided that in case any employer so withdraws, his liability to assessments shall, notwithstanding such withdrawal, continue for one year after the date of such withdrawal as against all liabilities for such compensation accruing prior to such withdrawal," stricken out by L. 1922, ch. 615.

Bill drafter's memorandum. The following memorandum was appended to ch. 668, Laws of 1939:

"This amendment enables an employer insured with the State Insurance Fund to cancel his policy upon completion of the operations for which the policy was issued or upon the *bona fide* discontinuance of his business. The State Fund must, however, still file with the Commissioner the statutory ten-day cancellation notice. The present statute does not permit an employer to withdraw from the Fund unless he gives written notice not less than 30 days before the expiration of the period for which he has elected to be insured in the Fund. The effect of this amendment will result in great relief in the orderly procedure with regard to the State Fund policyholders. Under the existing law contracts of insurance issued to employers who have discontinued business or completed operations covered by such contracts continue in effect to the anniversary dates thereof and consequently no final accounting or premium adjustment can be made until after expiration of the entire contract."

Prior to elimination of the assessment provision from this section by L. 1922, ch. 615, the Attorney-General, in an opinion of July 16, 1915, 81 S. B. 349, had held that assessments for compensation liabilities could not be levied upon State Fund policy holders. Compare § 53, above.

Cancellation of State Fund policies is governed by subd. 5 of § 54, above. The department may cancel State Fund insurance policies and make rules relative to such cancellation: Opinion of Attorney-General, 81 S. B. 356, February 11, 1916.

The conditions and relations of cancellation of State Fund policies and withdrawal from the State Fund are interpreted in Schwartz et al. v. Window Cleaning Cos., 5 Bul. 107; 98 S. B. 66; see also Opinion of Attorney-General, September 28, 1935.

§ [1]95. [2]**Record and audit of payrolls.** Every employer who is insured in the state insurance fund shall keep a true and accurate record of the number of his employees and the wages paid by him, and shall furnish, [3]upon demand, a sworn statement of the same. Such record shall be open to inspection at any time and as often as [4]may be necessary to verify the number of employees and the amount of the payroll. [5]Any employer who shall fail to keep such record or who shall wilfully falsify any such record, shall be guilty of a misdemeanor. [*As am'd by L.* 1922, *ch.* 615, *and renumbered by L.* 1938, *ch.* 585.]

[1] This § 95, formerly § 101, renumbered by L. 1938, ch. 585.

[2] Words "Record and" inserted by L. 1922, ch. 615.

[3] Words "to the commission" stricken out by L. 1922, ch. 615.

[4] Words "may be necessary" substituted for words "the commission shall require," by L. 1922, ch. 615.

[5] Following sentence added by L. 1922, ch. 615. It takes the place of former § 102 which provided a civil penalty for payroll misrepresentation and which was stricken out by L. 1922, ch. 615.

For a case involving payroll records compare Reddy v. National Excavating Co., 10 S. D. R. 621; 178 App. Div. 943.

§ 96. **Wilful misrepresentation.** Any person who wilfully misrepresents any fact in order to obtain insurance in the state insurance fund at less than the proper rate for such insurance, or in order to obtain payment out of such fund, shall be guilty of a misdemeanor. [*Former* § 103, *renumbered* § 102 *by L.* 1922, *ch.* 615, *and* § 96 *by L.* 1938, *ch.* 585.]

Former § 96 renumbered § 90 by L. 1938, ch. 585.

§ 97. **Inspections.** The [1]commissioners shall have the right to inspect the plants and establishments of employers insured in the state insurance fund; and the inspectors designated by the [1]commissioners shall have free access to such premises during regular working hours. [*Former* § 104, *renumbered* § 103 *and am'd by L.* 1922, *ch.* 615; *renumbered* § 97 *by L.* 1938, *ch.* 585.]

[1] Word "commissioners" substituted for word "commissioner" by L. 1938, ch. 585; "commissioner" had been substituted for "commission" by L. 1922, ch. 615.

Former § 97 renumbered § 91 by L. 1938, ch. 585.

§ 98. **Disclosures prohibited.** Information [5]as required by the [1]state fund, or its officers or employees, from employers or employees pursuant to this chapter shall not be opened to public inspection, and any officer or employee [2]who, without authority of the [3]commissioners or pursuant to [4]their regulations, or as otherwise required by law, shall disclose the same shall be guilty of a misdemeanor. [*Former* § 105, *renumbered* § 104 *and am'd by L.* 1922, *ch.* 615; *renumbered* § 98 *and am'd by L.* 1938, *ch.* 585.]

[1] Words "state fund" substituted for word "commission" by L. 1922, ch. 615.

[2] Words "of the commission" stricken out by L. 1922, ch. 615.

[3] Word "commissioners" substituted for word "commissioner" by L. 1938, ch. 585; "commissioner" had been substituted for "commission" by L. 1922, ch. 615.

[4] Word "their" substituted for word "his" by L. 1938, ch. 585; words "his regulations" had been substituted for words "its rules" by L. 1922, ch. 615.

[5] Words "as required" substituted for word "acquired" by L. 1938, ch. 585.

§ 99. **Reports of state insurance fund; examination by insurance department.** The [1]commissioners shall make [2]separate reports to the superintendent of insurance concerning the state insurance fund at the same [3]time and in the same manner as is required from mutual employers' liability and workmen's compensation corporations by section [4]twenty-six of the insurance law, and the superintendent of insurance may examine into the condition of such state insurance fund at any time, either personally or by any duly authorized examiner appointed by him for the purpose of determining the condition of the investments and the adequacy of the reserves of such fund. [*Former* § 106, *added by L.* 1916, *ch.* 622, *renumbered* § 105 *and am'd by L.* 1922, *ch.* 615; *renumbered* § 99 *and am'd by L.* 1938, *ch.* 585; *L.* 1940, *ch.* 435.]

[1] Word "commissioners" substituted for word "commissioner" by L. 1938, ch. 585; "commissioner" had been substituted for "commission" by L. 1922, ch. 615.

[2] Word "separate" inserted by L. 1938, ch. 585.

[3] Word "time" substituted for word "times" by L. 1938, ch. 585.

[4] Words "twenty-six" substituted for words "one hundred and ninety-two" by L. 1940, ch. 435.

ARTICLE 6-A

Workmen's Compensation Security Funds

[*This Article 6-A, formerly Article 5 added by L. 1935, ch. 255, renumbered by L. 1938, ch. 585; §§ 106-109-j of this Article 6-A comprise former §§ 60-73 as added by L. 1935, ch. 255 and renumbered §§ 75-88 by L. 1937, ch. 574. Former Articles 5, 6 and 7 renumbered Articles 6, 7 and 8 by L. 1935, ch. 255; §§ 90-106 of Article 6 renumbered §§ 76-99 by L. 1938, ch. 585. Section 4 of ch. 255, Laws of 1935, provides that invalidity of any part of this Article, as so adjudged by court, shall not affect any other part of the Article.*]

Section 106. Definitions.

107. Stock workmen's compensation security fund.
108. Payments into stock fund; returns.
109. Suspension of payments into stock fund.
109-a. Administration of stock fund.
109-b. Custody and investment of stock fund.
109-c. Payments from stock fund.
109-d. Mutual workmen's compensation security fund.
109-e. Payments into mutual fund; returns.
109-f. Distribution of mutual fund excess.
109-g. Administration, custody and investment of and payments from mutual fund.
109-h. Notification of insolvency.
109-i. Rights and duties of superintendent of insurance as administrator of the funds.
109-j. Expenses of administration.

§ 106. **Definitions.** As used in this article, unless the context or subject matter otherwise require;

"Stock fund" means the stock workmen's compensation security fund created by this section.

"Mutual fund" means the mutual workmen's compensation security fund created by this section.

"Funds" means the stock workmen's compensation security fund and the mutual workmen's compensation security fund.

"Fund" means either the stock workmen's compensation security fund of the mutual workmen's compensation security fund, as the context may require.

"Fund year" means the calendar year.

"Stock carrier" means any stock corporation other than an insolvent carrier, authorized to transact the business of workmen's compensation insurance in this state.

"Mutual carrier" means any mutual corporation association other than an insolvent carrier, authorized to transact the business of the workmen's compensation insurance in this state.

"Carrier" means either a stock carrier or a mutual carrier as the context may require.

"Insolvent stock carrier" or "insolvent mutual carrier" means a stock carrier or a mutual carrier, as the case may be, as to which an order of rehabilitation or of liquidation, or, if such carrier be

a foreign insurer, as to which an order for conservation of its assets within the state, shall have been made after the effective date of this act pursuant to article *eleven of the insurance law, or a foreign stock or mutual carrier which withdraws from or discontinues operation in this state and fails to meet payments due on awards made, but not including a carrier, whether a domestic or foreign insurer, which shall have become rehabilitated and allowed to resume business after any such rehabilitation or conservation of assets and meets its obligations as they mature. [*This former* § 60 *inserted by L.* 1935, *ch.* 255, *renumbered* § 75 *by L.* 1937, *ch.* 574 *and* § 106 *by L.* 1938, *ch.* 585.]

§ 107. **Stock workmen's compensation security fund.** There is hereby created a fund to be known as "the stock workmen's compensation security fund," for the purpose of assuring to persons [1]and funds entitled thereto the compensation [2]and benefits provided by this chapter for employments insured in insolvent stock carriers. Such fund shall be applicable to the payment of awards for compensation or death benefits [3]and to the payment of benefits into the special funds created under the provisions of section fifteen subdivisions eight and nine and section twenty-five-a of this chapter heretofore or hereafter made pursuant to this chapter, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this act, of an insolvent stock carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by stock carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the superintendent of insurance in accordance with the provisions of this article. [*This former* § 61 *inserted by L.* 1935, *ch.* 255; *am'd and renumbered* § 76 *by L.* 1937, *ch.* 574; *renumbered* § 107 *by L.* 1938, *ch.* 585.]

[1] Words "and funds" inserted by L. 1937, ch. 574.

[2] Words "and benefits" inserted by L. 1937, ch. 574.

[3] Words "and to . . . of this chapter" inserted by L. 1937, ch. 574.

Section 107 (formerly § 76) and § 109-d (formerly § 82), following, limit application of the security funds to cases of default occurring after March 27, 1935: Opinions of Attorney-General, June 1, and 22, 1935.

§ 108. **Payments into stock fund; returns.** 1. Every stock carrier shall, on or before the first day of April, nineteen hundred thirty-five, file with the commissioner of taxation and finance and with the superintendent of insurance identical returns, under oath, on a form to be prescribed and furnished by the superintendent of insurance, stating the amount of net written premiums for policies issued or renewed by such carrier, during the calendar year nineteen hundred thirty-four, to insure payment of compen-

* Now Article 16 of the Insurance Law.

sation pursuant to the workmen's compensation law of the state of New York. For the purposes of this section "net written premiums" shall mean gross written premiums less return premiums on policies returned "not taken" and on policies cancelled. Thereafter, on or before the fifteenth day of February, May, August and November, of each year, each such carrier shall file, quarterly, similar identical returns [1]as to business transacted by such carriers during the three months' periods ending, respectively, on the preceding December thirty-first, March thirty-first, June thirtieth and September thirtieth. [*Subd.* 1 *am'd by L.* 1937, *ch.* 574.]

[1] Words "as to business transacted" substituted for words "stating the amount of such net written premiums for such policies issued or renewed" by L. 1937, ch. 574.

2. For the privilege of carrying on the business of workmen's compensation insurance in this state, every stock carrier shall pay into the stock fund on the first day of April, nineteen hundred thirty-five, or within thirty days after this act takes effect, a sum equal to one per centum of its net written premiums, as shown by the return hereinbefore prescribed for the calendar year nineteen hundred thirty-four, and thereafter each such stock carrier, upon filing each quarterly return, shall pay a sum equal to one per centum of its net written premiums, for the period covered by such return. [*This former* § 62 *inserted by L.* 1935, *ch.* 255; *am'd and renumbered* § 77 *by L.* 1937, *ch.* 574; *renumbered* § 108 *by L.* 1938, *ch.* 585.]

The returns for 1934 or for quarterly periods should not cover premiums on policies issued prior to January 1, 1934: Opinions of Attorney-General, December 17 and 31, 1935.

§ 109. **Suspension of payments into stock fund.** When the aggregate amount of all such payments into the stock fund, together with accumulated interest thereon, less all its known liabilities, and estimated liabilities on pending cases, becomes equal to five per centum of the New York workmen's compensation loss reserves of all stock carriers as of December thirty-first, next preceding, or becomes equal to two million three hundred thousand dollars, whichever amount is the greater, no further contributions to said fund shall be required to be made, provided, however, that whenever, thereafter, the amount of said fund shall be reduced below five per centum of such loss reserves or two million three hundred thousand dollars, whichever is greater, as of said date by reason of payments from and known liabilities and estimated liabilities on pending cases of said stock fund, then such contributions to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities and estimated liabilities on pending cases shall be equal to five per centum of such reserves or two million three hundred thousand dollars, whichever is greater. [*This former* § 63 *inserted by L.* 1935, *ch.* 255; *renumbered* § 78 *by L.* 1937, *ch.* 574, *and* § 109 *by L.* 1938, *ch.* 585.]

§ 109-a. **Administration of stock fund.** The superintendent of insurance may adopt, amend and enforce all reasonable rules and regulations necessary for the proper administration of said stock fund. In the event any stock carrier shall fail to file any return or make any payment required by this article, or in case the superintendent of insurance shall have cause to believe that any return or other statement filed is false or inaccurate in any particular, or that any payment made is incorrect, he shall have full authority to examine all the books and records of the carrier for the purpose of ascertaining the facts and shall determine the correct amount to be paid and may proceed in any court of competent jurisdiction to recover for the benefit of the fund any sums shown to be due upon such examination and determination. Any stock carrier which fails to make any statement as required by this article, or to pay any contribution to the stock fund when due, shall thereby forfeit to said fund a penalty of five per centum of the amount of unpaid contribution determined to be due as provided by this article plus one per centum of such amount for each month of delay, or fraction thereof, after the expiration of the first month of such delay but the superintendent, if satisfied that the delay was excusable, may remit all or any part of such penalty. The superintendent, in his discretion, may revoke the certificate of authority to do business in this state of any foreign carrier which shall fail to comply with this article or to pay any penalty imposed in accordance with this article. [*This former* § 64 *inserted by L.* 1935, *ch.* 255; *renumbered* § 79 *by L.* 1937, *ch.* 574, *and* § 109-*a by L.* 1938, *ch.* 585.]

§ 109-b. **Custody and investment of stock fund.** The stock fund created by this article shall be separate and apart from any other fund so created and from all other state moneys, and the faith and credit of the state of New York is pledged for its safekeeping. The commissioner of taxation and finance shall be the custodian of said fund; and all disbursements from said fund shall be made by the commissioner of taxation and finance upon vouchers signed by the superintendent of insurance, or his deputy, as hereinafter provided. The moneys of said fund may be invested by the commissioner of taxation and finance only in the stocks or bonds of the United States or of this state. The commissioner of taxation and finance may sell any of the securities in which said fund is invested, if advisable for its proper administration or in the best interests of such fund, and all earnings from the investments of such fund shall be credited to such fund. [*This former* § 65 *inserted by L.* 1935, *ch.* 255; *renumbered* § 80 *by L.* 1937, *ch.* 574, *and* § 109-*b by L.* 1938, *ch.* 585.]

§ 109-c. **Payments from stock fund.** 1. The final award for compensation or death benefits, or installments thereof, [1]or of payment of benefits into the special funds created under the provi-

sions of section fifteen, subdivisions eight and nine and section twenty-five-a of this chapter heretofore or hereafter granted pursuant to this chapter, which has remained or shall remain due and unpaid for thirty days, by reason of default by an insolvent stock carrier, shall be paid from the stock fund in the manner provided in this section. The industrial commissioner or any person in interest may file with the superintendent of insurance an application for payment of compensation or death benefits [2]or special fund benefits from the stock fund on a form to be prescribed and furnished by the superintendent. If there has been an award, final or otherwise, a certified copy thereof shall accompany the application. The superintendent of insurance shall thereupon certify to the commissioner of taxation and finance such award for payment according to the terms of the same. [*Subd.* 1 *am'd by L.* 1937, *ch.* 574.]

[1] Words "or of . . . of this chapter" inserted by L. 1937, ch. 574.
[2] Words "or special fund benefits" inserted by L. 1937, ch. 574.

2. Payments from the stock fund shall be made by the commissioner of taxation and finance on the said certificate of the superintendent of insurance, and no payment shall be made by the commissioner of taxation and finance in excess of the amount certified.

3. Payment of the award from the stock fund shall not give the fund any right of recovery against the employer.

4. An employer may pay any such award or part thereof in advance of payment from the stock fund and shall thereupon be subrogated to the rights of the employee or other party in interest against such fund to the extent of the amount so paid.

5. The commissioner of taxation and finance as custodian of the stock fund shall be entitled to recover the sum of all liabilities of such insolvent carrier assumed by such fund from such carrier, its receiver, liquidator, rehabilitator or trustee in bankruptcy and may prosecute an action or other proceedings therefor. All moneys recovered in any such action or procedings* shall forthwith be placed to the credit of the stock fund by the commissioner of taxation and finance to reimburse the stock fund to the extent of the moneys so recovered and paid.

6. The provisions of section twenty-six of this chapter shall not apply in the case of a failure to pay any compensation when due by reason of the default, after the effective date of this act, of an insolvent carrier as defined in this article, and the provisions of section thirty-four of this chapter shall not apply to compensation insured by any carrier as defined in this article if the compensation is paid by the fund. [*This former* § 66 *inserted by L.* 1935, *ch.* 255, *am'd and renumbered* § 81 *by L.* 1937, *ch.* 574; *renumbered* § 109-*c by L.* 1938, *ch.* 585.]

* So in original. Evidently should be "proceedings."

§ 109-d. **Mutual workmen's compensation security fund.** There is hereby created a fund to be known as "the mutual workmen's compensation security fund" for the purpose of assuring to persons [1]and funds entitled thereto the compensation [2]and benefits provided by this chapter for employments insured in insolvent mutual carriers. Such fund shall be applicable to the payment of awards for compensation or death benefits [3]and to the payment into the special funds created under the provisions of section fifteen subdivisions eight and nine and section twenty-five-a of this chapter heretofore or hereafter made pursuant to this chapter, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this act, of an insolvent mutual carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by mutual carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the superintendent of insurance in accordance with the provisions of this article. [*This former* § 67 *inserted by L.* 1935, *ch.* 255, *am'd and renumbered* § 82 *by L.* 1937, *ch.* 574; *renumbered* § 109-*d by L.* 1938, *ch.* 585.]

[1] Words "and funds" inserted by L. 1937, ch. 574.
[2] Words "and benefits" inserted by L. 1937, ch. 574.
[3] Words "and to . . . of this chapter" inserted by L. 1937, ch. 574.

Section 109-d (formerly § 82) and § 107 (formerly § 76), above, limit application of the security funds to cases of default occurring after March 27, 1935: Opinions of Attorney-General, June 4 and 22, 1935.

§ 109-e. **Payments into mutual fund; returns.** 1. Every mutual carrier shall, on or before the first day of April, nineteen hundred thirty-five, file with the commissioner of taxation and finance and with the superintendent of insurance identical returns, under oath, on a form to be prescribed and furnished by the superintendent of insurance, stating the amount of net written premiums for policies issued or renewed by such carrier, during the calendar year nineteen hundred and thirty-four, to insure payment of compensation pursuant to the workmen's compensation law of the state of New York, and stating also the amount of dividends paid to policyholders during said year. For the purposes of this section "net written premiums" shall mean gross written premiums less return premiums on policies returned "not taken" and on policies cancelled. Thereafter, on or before the fifteenth day of February, May, August and November, of each year, each such carrier shall file quarterly similar identical returns as to business transacted by such carrier during the three months' periods ending, respectively, on the preceding December thirty-first, March thirty-first, June thirtieth and September thirtieth.

2. For the privilege of carrying on the business of workmen's compensation insurance in this state, every mutual carrier shall

pay into the mutual fund on the first day of April nineteen hundred thirty-five, or within thirty days after the act become effective, a sum equal to one per centum of its net written premiums, less dividends paid to policyholders, as shown by the return hereinbefore prescribed for the calendar year nineteen hundred thirty-four, and thereafter each such mutual carrier, upon filing each quarterly return, shall pay a sum equal to one per centum of its net written premiums, less dividends to policyholders, as shown for the period covered by such return. [*This former* § 68 *inserted by L.* 1935, *ch.* 255, *renumbered* § 83 *by L.* 1937, *ch.* 574, *and* § 109-*e by L.* 1938, *ch.* 585.]

§ 109-f. **Distribution of mutual fund excess.** Whenever the mutual fund, less all its known liabilities, and estimated liabilities on pending cases, shall exceed the sum of seven hundred thousand dollars or an amount equal to five per centum of the New York workmen's compensation loss reserves of all mutual carriers, as of December thirty-first next preceding, whichever amount is the greater, distribution of such excess, subject to the advance approval of the superintendent of insurance, shall be made as repayments for successive fund years, commencing with the first fund year, to the mutual carriers in the proportion in which they respectively made contributions for such fund year, provided, however, no such distribution shall reduce the fund, less all its known liabilities, and estimated liabilities on pending cases, below an amount equal to five per centum of such loss reserves as of said date, or seven hundred thousand dollars, whichever is greater. Such repayments shall be made from time to time until the mutual carriers for the first fund year shall have received their proportionate shares of the contributions for the first fund year including interest, if any. Such repayments for succeeding fund years in their order shall be made on the same basis. The insolvency of any mutual carrier shall automatically terminate its right to such repayments and the withdrawal of any mutual carrier from the transaction of workmen's compensation insurance business in the state of New York shall automatically suspend its right to such repayments until all its known and estimated liabilities for workmen's compensation losses in the state of New York shall have been fully liquidated. If and when all known and estimated liabilities of all mutual carriers for workmen's compensation losses in the state of New York shall have been fully liquidated, distribution shall be made of the remaining balance of the mutual fund in the proportion in which each such mutual carrier made contributions to the mutual fund. [*This former* § 69 *inserted by L.* 1935, *ch.* 255, *renumbered* § 84 *by L.* 1937, *ch.* 574, *and* §109-*f by L.* 1938, *ch.* 585.]

§ 109-g. ***Administration, custody and investment of and payments from mutual fund.** The provisions of section †sixty-four of this article, relating to the administration of the stock fund and the provisions of section †sixty-five of this article relating to custody and investment of the stock fund and the provisions of section †sixty-six of this article, relating to payments from the stock fund, shall apply, [1]mutatis mutandis, to the administration, custody and investment of and payments from the mutual fund. [*This former* § 70 *inserted by L.* 1935, *ch.* 255; *am'd and renumbered* § 85 *by L.* 1937, *ch.* 574; *renumbered* § 109-*g by L.* 1938, *ch.* 585.]

[1] Words "mutatis mutandis" substituted for words incorrectly spelled "nutatis nutandis" by L. 1937, ch. 574.

§ 109-h. **Notification of insolvency. Duties of industrial commissioner.** Forthwith upon any stock carrier becoming an insolvent stock carrier or upon any mutual carrier becoming an insolvent mutual carrier the superintendent of insurance shall so notify the industrial commissioner, who shall immediately advise the superintendent (a) of all claims for compensation pending or thereafter made against an employer insured by such insolvent carrier or against such insolvent carrier; (b) of all unpaid or continuing awards and decisions made upon claims prior to or after the date of such notice from the superintendent; and (c) of all appeals from or applications for modification or rescission or review of such awards or decisions. [*This former* § 71 *inserted by L.* 1935, *ch.* 255; *renumbered* § 86 *by L.* 1937, *ch.* 574, *and* § 109-*h by L.* 1938, *ch.* 585.]

§ 109-i. **Rights and duties of superintendent of insurance as administrator of the funds.** The superintendent of insurance may designate or appoint a duly authorized representative or representatives to appear and defend before the industrial board or a referee any or all claims for compensation [1]or benefits against an employer insured by an insolvent carrier or against such insolvent carrier. The superintendent of insurance shall have, as of the date of the insolvency of any stock or mutual carrier, only all the rights and duties which the insurance carrier would have had with respect to awards made or claims for compensation [1]or benefits filed or pending, if it had not become insolvent. For the purposes of this article the superintendent shall have power to employ such counsel, clerks and assistants as may by him be deemed necessary, and to give each of such persons such powers to assist him as he may consider wise. [*This former* § 72 *inserted by L.* 1935, *ch.* 255; *am'd and renumbered* § 87 *by L.* 1937, *ch.* 574; *renumbered* § 109-*i by L.* 1938, *ch.* 585.]

[1] Words "or benefits" inserted by L. 1937, ch. 574.

* Section side title supplied by L. 1937, ch. 574.

† Former §§ 64, 65 and 66 renumbered §§ 109-a, 109-b and 109-c, respectively, by L. 1938, ch. 585.

§ 109-j. **Expenses of administration.** The expense of administering the stock fund shall be paid out of the stock fund, and the expense of administering the mutual fund shall be paid out of the mutual fund. Prior to the first days of January, April, July and October there shall be submitted to the director of the budget for approval an estimated budget of expenditures for the succeeding three months. There may not be expended for the purpose of administering either fund more than the amounts as authorized by the director of the budget. The superintendent of insurance shall serve as administrator of each fund without additional compensation, but may be allowed and paid from either fund expenses incurred in the performance of his duties in connection with that fund. The compensation of those persons employed by the superintendent of insurance, within the amounts approved by the director of the budget, shall be deemed administration expense payable from the fund. The superintendent of insurance shall include in his annual report to the legislature a statement of the expense of administering each of such funds for the preceding year. [*This former* § 73 *inserted by L.* 1935, *ch.* 255; *renumbered* § 88 *by L.* 1937, *ch.* 574, *and* § 109-*j by L.* 1938, *ch.* 585.]

ARTICLE 7

Miscellaneous Provisions

[*This Article* 7 *is former Article* 6 *renumbered by L.* 1935, *ch.* 255, § 2, *which Article* 6 *was derived by L.* 1922, *ch.* 615, *from former Articles* 4 *and* 6. *Sections* 60 *and* 61 *of the Workmen's Compensation Law were repealed, and the functions of the Workmen's Compensation Commission transferred to the newly created Industrial Commission, by L.* 1915, *ch.* 674, § § 2-8; *such functions were further transferred to the Industrial Commissioner and the Industrial Board, as successors of the Industrial Commission, by the Labor Law, L.* 1921, *ch.* 50, § 21, *subd.* 2, § § 27 *and* 471. *Sections* 62, 63, 65, 66, 75, *of the Workmen's Compensation Law, were repealed by L.* 1921, *ch.* 60, *their provisions being covered by the Labor Law. For organization of the Department of Labor and functions of the Industrial Commissioner and the Industrial Board, see Labor Law, Article* 2, *as modified by the State Departments Law, Articles* 1, 10, *and* 20.]

Section 110. Record and report of injuries by employers.
111. Information to be furnished by employer.
112. Inspection of records of employers.
113. Interstate commerce.
114. Penalties for false representations.
115. Limitation of time.
116. Sessions.
117. Rules.
118. Technical rules of evidence or procedure not required.
119. Subpoenas.
120. Fees of witnesses.
121. Depositions.
121-a. Proof of dependency in foreign countries.
122. Transcripts.
123. Jurisdiction of department to be continuing.

Section 124. Blank forms.
125. Undertakings.
126. Expenses of administering workmen's compensation law.
127. Construction.
128. Unconstitutional provisions.
129. Actions or causes of action pending.
130. Workmen's compensation premiums shall be deemed preferred claims.
131. Payroll records.
132. Criminal prosecution.
133. Refunds and credits.

§ 110. **Record and report of injuries by employers.** Every employer shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury, [1]which shall cause a loss of time beyond the day or working shift on which the accident occurred, or which shall require medical treatment beyond ordinary first aid, a report thereof shall be made in writing by the employer to the commissioner upon blanks to be procured from the commissioner for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address and occupation of the injured employee, the time, nature and cause of the injury and such other information as may be required by the commissioner. [2]An employer shall furnish a report of any other accident resulting in an injury received by an employee in the course of his employment or an occupational disease incurred by an employee in the course of his employment whenever directed by the commissioner. An employer who refuses or neglects to make a report as required by this section shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars. [*Former* § 111, *renumbered* § 110 *by L.* 1922, *ch.* 615; *am'd by L.* 1928, *ch.* 754.]

[1] Words "which shall . . . first aid" inserted by L. 1928, ch. 754.
[2] Words "An employer . . . commissioner" inserted by L. 1928, ch. 754.

The Department of Labor furnishes a form for the report required by this section, No. C-2.

In regard to evidence of accidental injury, §§ 18, 21 and 110 are to be read together. The employer's failure to give the details required by § 110 has told against him in McQueeney v. Sutphen & Myer, 167 App. Div. 528; 81 S. B. 392; Kohler v. Frohmann, 167 App. Div. 533; 81 S. B. 394; and Powley v. Vivian & Co., 169 App. Div. 170; 81 S. B. 74.

For a case involving an employer's failure to report see Hughes v. General Electric Co., 204 App. Div. 851; 123 S. B. 63.

§ 111. **Information to be furnished by employer.** Every employer shall furnish the [1]commissioner, upon request, any information required by [2]him to carry out the provisions of this chapter. [3]A member of the board, the commissioner, deputy commissioner, or any person deputized by the [4]commissioner or board

for that purpose, may examine under oath any employer, officer, agent or employee. An employer or an employee receiving from the [1]commissioner a blank with directions to file the same shall cause the same to be properly filled out so as to answer fully and correctly all questions therein, or if unable to do so, shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the [1]commissioner within the period fixed by the [1]commissioner therefor. [*Former* § 112, *renumbered* § 111 *and am'd by L.* 1922, *ch.* 615.]

[1] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.
[2] Word "him" substituted for word "it" by L. 1922, ch. 615.
[3] Words "A member of the board, the" substituted for words "The commission, a" by L. 1922, ch. 615.
[4] Words "commissioner or board" substituted for word "commission" by L. 1922, ch. 615.

Compare § 51.

§ 112. **Inspection of records of employers.** All books, records and payrolls of the employers, showing or reflecting in any way upon the amount of wage expenditures of such employers shall always be open for inspection by the [1]commissioner or any of [2]his authorized auditors, accountants or inspectors for the purpose of ascertaining the correctness of the wage expenditure and number of men employed and such other information as may be necessary for the uses and purposes of the [1]commissioner in the administration of this chapter. [*Former* § 113, *renumbered* § 112 *and am'd by L.* 1922, *ch.* 615.]

[1] Word "commissioner" substituted for word "commission" by L. 1922, ch. 615.
[2] Word "his" substituted for word "its" by L. 1922, ch. 615.

Compare Labor Law, § 26.

§ 113. **Interstate commerce.** The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, [1]provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter. [*Former* § 114, *renumbered* § 113 *and am'd by L.* 1922, *ch.* 615.]

[1] Words "provided . . . chapter" substituted by L. 1922, ch. 615, for words "except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

ADMIRALTY JURISDICTION

Engineer. Award to a derrick boat engineer injured aboard boat was affirmed: Bohen v. McLain Construction Corp., 257 App. Div. 887; 204 S. B. 554.

Ferry crew member. Claim of member of crew for accident aboard ferry in navigable waters was dismissed: Chaconis v. City of New York, 257 App. Div. 885; 204 S. B. 556.

Fruit handler. A fruit handler for a produce company, while pushing a hand truck loaded with ice up a gangplank to a railroad car float, slipped and fell to the deck of the float. The gangplank led from a pier in the North River, New York City, to the float which was stationed alongside the pier. Claim for compensation was dismissed, with statement, "The injury occurred in navigable waters while claimant was performing maritime services and the Industrial Board had no jurisdiction of the claim." Schwartz v. Kodish & Zwick, 260 App. Div. 966.

Garage mechanic. Service station employee and garage mechanic worked in a garage near a bay. The water in said bay was not over two feet in depth and the ebb and flow of the tide was about one foot. Mechanics employed in the garage at times repaired boats moored in the bay. The garage owner, employer herein, in an effort to save his pleasure boat from damage during a severe storm, requested said mechanic to install batteries in the boat and to assist him in moving it out into the bay. In the course of this work, both men were drowned. Award of death benefits to the mechanic's widow and child was affirmed. Hawkins v. Raynor, 261 App. Div. 1011; 286 N. Y. Rep. —.

Pier superintendent. Pier superintendent for warehouse who supervised distribution by trucks of newsprint rolls from pier to publishing houses was killed in fall into a hatch of a boat moored at the pier which he had boarded in order to locate certain freight. Actual unloading of the freight was performed by an independent stevedore. Findings of Industrial Board that at the time said superintendent sustained the fatal injuries he was not engaged in performing any work of a maritime character or nature and that the said work bore no relation to navigation but was a matter of local concern, upheld: Dimino v. Independent Warehouses, Inc., 259 App. Div. 942; 284 N. Y. 481; petition for writ of certiorari denied, —— U. S. ——, April 28, 1941.

State grain elevator employee. Decedent was employed as a grain unloader by the State of New York and entered in and upon various grain boats which docked at the State terminal for discharge of cargo into the State elevator. While said decedent was working in the hold of a steamship docked in the navigable waters of Lake Ontario, Port of Oswego, New York, preparing certain power shovels for use in discharging the grain cargo he sustained fatal injuries. The ship was owned by an Ohio company and its crew neither unloaded nor assisted in unloading the cargo. In a claim filed against the State of New York pursuant to the Court of Claims Act and the Jones Act, the State moved for dismissal on the ground that the only remedy available in the case was under the Workmen's Compensation Law. Motion denied. Otis v. State of New York, 176 Misc. 389.

Tugboat caretaker. Caretaker and engineer on tugboat which was tied up at pier and temporarily out of service due to a labor strike was on twenty-four hour duty. He obtained his meals, however, on shore. One evening said caretaker went ashore to get supper and also to get some tools sharpened. He did not return to the pier until early the following morning and the taxicab driver who took him back watched him proceed in the direction of the tug. This was the last time he was seen alive. About three weeks later his body was recovered from the water and his death was attributed to drowning. Decision of the Industrial Board that decedent was not engaged in maritime employment at time of his death, upheld. Orim v. Oil Transfer Corp., 262 App. Div. 433.

Watchmen. A watchman upon a derrick anchored near a sea wall reached the derrick by means of a row boat. Said sea wall was being reconditioned for the purpose of constructing a highway on top of it. One Sunday morning the watchman was missing and his row boat was found afloat about one hundred and fifty feet from the derrick. Later his body was discovered and death was attributed to drowning. Award of death benefits was affirmed, with statement, "He was performing his duties when last seen. The derrick was not a vessel and could not propel itself and was being used entirely in connection with building a roadway on the land." Heikkila v. Steers, Inc., 261 App. Div. 1012.

Accident to a watchman on deck while guarding a steamship tied up at dock in navigable waters was held compensable where the steamship was off charter, out of commission and without marine insurance: Jones v. International Mercantile Marine Co., 252 App. Div. 347; 277 N. Y. Rep. 640; 204 S. B. 557.

Wrecker. Award to claimant injured while wrecking boats in navigable waters was affirmed: Connelly v. Connelly, 252 App. Div. 909; 204 S. B. 556.

Waiver. Conduct of a self-insured employer was construed as waiver and estoppel re questions of jurisdiction and constitutionality: Haglund v. Morse Dry Dock & Repair Co., 255 App. Div. 895; 204 S. B. 559; Agne v. Morse D. D. & R. Co., 255 App. Div. 897; Felcher v. Morse D. D. & R. Co., 255 App. Div. 896; Turner v. Morse D. D. & Repair Co., 255 App. Div. 896.

Waiver provision enacted by L. 1922, ch. 615, was held retroactive: Kane v. Morse Dry Dock & Repair Co., 250 App. Div. 888; 277 N. Y. Rep. 533; 204 S. B. 560.

Other cases. For references to earlier court decisions interpretative of this section, see "Introduction," above.

INTERSTATE COMMERCE JURISDICTION

The Federal Employers' Liability Act was amended (Public Act No. 382—76th Congress, approved August 11, 1939) so as to provide that any employee of a common carrier any part of whose duties is in furtherance of interstate or foreign commerce, or which directly or closely and substantially affects such commerce, shall be considered as being employed by the carrier in such commerce and entitled to the benefits of the Liability Act. This amendment was interpreted in Ermin v. Pennsylvania R. R. Co., District Court, E. D., New York, 36 Fed. Supp. 936, 941, digest of which appears above, page 7.

Accidents in the cases reported below under this title occurred prior to the effective date of Public Act 382, supra.

Railroad baggageman. Baggageman at railroad depot located in New York City injured his leg while operating an electric truck loaded with United States mail bags to be placed on a train which operated between New York City and Long Island. Claim for compensation dismissed on ground that claimant was engaged in interstate commerce at time of the accident, inasmuch as the train in question carried mail which originated in and had been brought from other States. Story v. Pennsylvania R. R. Co., 259 App. Div. 943; 204 S. B. 561.

Railroad electrician. Accident while putting yard marker on engine withdrawn from interstate commerce for inspection and not definitely reassigned to such service was held compensable under Workmen's Compensation Law: La Point v. N. Y. Central R. R. Co., 254 App. Div. 711; 204 S. B. 562.

Railroad laborer. Laborer for railroad sustained injuries while repairing the chain on a door at the entrance to a pier in North River, New York City. Claim dismissed on ground that the pier and door were instrumentalities directly connected with interstate commerce: Bologna v. Central R. R. Co. of New Jersey, 259 App. Div. 943; 204 S. B. 563.

Railroad pipe fitter. Railroad pipe fitter sustained injuries while repairing an empty baggage car which had been withdrawn from interstate service for repairs, conditioning and inspection, as required by regulation. Said baggage

car was out of service for about twenty-two hours and had not been reassigned thereto at time of the accident. Decision that at time said pipe fitter sustained injury he was not engaged in interstate commerce or in work so closely identified therewith as to be a part thereof, upheld. Green v. Pennsylvania R. R. Co., 261 App. Div. 1031.

Railroad trackman. Trackman for railroad who was mixing cement for use in the repair of a track lifted a bag of cement and suffered a hernia. On the date of the accident said track had been withdrawn from service in interstate transportation for about four hours in order that the repairs might be made. Dismissal of claim on ground that all trains leaving and coming into the Pennsylvania Station are interstate and that claimant was engaged in interstate commerce at the time of the accident was upheld: Shamroy v. Pennsylvania R. R. Co., 260 App. Div. 968; 285 N. Y. Rep. ——.

Other cases. For references to earlier court decisions interpretative of this section, see "Introduction," above.

§ 114. **Penalties for false representation.** If for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for himself or any other person, any person wilfully makes a false statement or representation, he shall be guilty of a misdemeanor. [*Former* § 115, *renumbered* § 114 *by L.* 1922, *ch.* 615.]

Compare §§ 43, 46.

This section was interpreted in People v. Rudnick, 255 App. Div. 813; 280 N. Y. 5; 204 S. B. 567.

§ 115. **Limitation of time.** No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor [1]so long as he has no committee [2]or guardian.[3] [*Former* § 116, *renumbered* § 115 *and am'd by L.* 1922, *ch.* 615.]

[1] Word "dependent" stricken but by L. 1922, ch. 615.

[2] Word "or" inserted by L. 1922, ch. 615.

[3] Words "or next friend" stricken out by L. 1922, ch. 615.

For limitations of time affected by this § 115, see §§ 18, 28, and 45, above.

Elimination of the word "dependent" by L. 1922, ch. 615, extends this section's protection to injured minor employees, offsetting Decker v. Pouvailsmith Corp., 252 N. Y. 1; 185 S. B. 500; and Beagle v. Groff, 198 App. Div. 453; 114 S. B. 123.

The term "guardian" in this section means a statutory guardian as distinguished from a natural guardian: Decker v. Pouvailsmith Corp., 252 N. Y. 1; 185 S. B. 500; Kingsley v. Bender, 252 N. Y. Rep. 516; 185 S. B. 502. See also Nesofsky v. Ragorotsky, 274 N. Y. Rep. 596; 204 S. B. 148; Kaplan v. Kaplan Knitting Mills, 221 App. Div. 484; 248 N. Y. 10; 156 S. B. 291, 296; Chase v. Ulster & Delaware R. R. Co., 32 S. D. R. 587; 215 App. Div. 581; 149 S. B. 129; Grillo v. Sherman-Stalter Co., 23 S. D. R. 306; 195 App. Div. 362; 231 N. Y. Rep. 621; 114 S. B. 84, 123.

Time limit does not run if the guardian, other than father or mother, does not reside in New York: Surrogate's Court Act, § 184, subd. 1; Westfelt v. Atlas Furniture Co., 256 N. Y. Rep. 578; 185 S. B. 503; Opinion of Attorney-General, March 19, 1931.

Arguments interpretative of the terms, "incompetent" and "next friend" are presented in 95 S. B. 266, 267; in connection with the case of Smith v. Washburn & Co., Case No. 18733; 183 App. Div. 911; 224 N. Y. Rep. 619.

The Industrial Board had power, because of claimant's infancy and incompetency, to extend claimant's time for filing claim for a period less than two years after time of claimant's coming of age: Naylor v. Carey, 250 App. Div. 792; 204 S. B. 409.

§ 116. **Sessions.** The offices of the department shall be open for business during all business hours of all days except Sundays and legal holidays. All sessions of the board shall be public. The records of the board shall contain a record of each case considered, and all awards, decisions or orders with respect thereto. For convenience of parties and prevention of delay or expense, the board may hold sessions in cities other than Albany. [*As drafted from former* § 64 *and numbered* § 116 *by L.* 1922, *ch.* 615.]

Reports of the Industrial Board's activities are in the Annual Reports of the Industrial Commissioner.

§ 117. **Rules.** The board may adopt reasonable rules consistent with and supplemental to the provisions of this chapter and the labor law. The commissioner may make reasonable regulations consistent with the provisions of this chapter and the labor law. [*As drafted from former* § 67 *and numbered* § 117 *by L.* 1922, *ch.* 615.]

The Board has adopted a code of "Rules and Procedure under the Workmen's Compensation Law," text of which appears below, in the Appendix below.

§ 118. **Technical rules of evidence or procedure not required.** The [1]commissioner, board, referee or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties. [2]Declarations of a deceased employee concerning the accident shall be received in evidence and shall, if corroborated by circumstances or other evidence, be sufficient to establish the accident and the injury. [*Former* § 68, *renumbered* § 118 *and am'd by L.* 1922, *ch.* 615.]

[1] Words "commissioner, board, referee" substituted for words "commission or a commissioner" by L. 1922, ch. 615.

[2] Remainder of section added by L. 1922, ch. 615.

Sections 18–29, § 50, subd. 3-b, §§ 51, 111, 112, 119–127, and opinions cited in notes thereunder, further regulate evidence, procedure, hearings, review, testimony, witnesses, etc. See also 162 S. B. 171–175, 269; 185 S. B. 462–476, 574; 204 S. B. 568; and Rules and Procedure Adopted by the Industrial Board, which appear in the Appendix below.

The courts have repeatedly emphasized the independence of precedents permitted and suggested by this section: Rheinwald v. Builders' Brick & Supply Co., 168 App. Div. 425; 81 S. B. 364; Kenny v. Union Railway Co., 166 App. Div. 497; 81 S. B. 365; Carroll v. Knickerbocker Ice Co., 169 App. Div. 450; 218 N. Y. 435; 81 S. B. 381; Dale v. Saunders Bros., 171 App. Div. 528; 218 N. Y. 59; 81 S. B. 342; Kaplan v. Kaplan Knitting Mills Co., 248 N. Y. 10; 156 S. B. 291.

EVIDENCE

The provisions of § 121 relative to depositions in no way restrict the Board's authority under this section; they do not exclude an ordinary affidavit: Moran v. Rodgers & Hagerty, 180 App. Div. 821; 95 S. B. 294.

Employer's first report of injury was held to have probative force even though not based on personal knowledge: Bollard v. Engel, 254 App. Div. 162; 278 N. Y. 463; 204 S. B. 135.

Opinions relative to expert evidence and the Board's relation thereto have been handed down in Johnson v. U. S. R. R. Administration, 193 App. Div. 580; 114 S. B. 31; Clayton v. Foundation Co., 193 App. Div. 822; 114 S. B. 35; Schemerhorn v. G. E. Co., 195 App. Div. 670; 114 S. B. 38; Turpin v. St. Regis Paper Co., 199 App. Div. 64; 233 N. Y. Rep. 536; 114 S. B. 44; Nazzaro v. Angelilli, 217 App. Div. 415; 149 S. B. 253; 222 App. Div. 784; 161 S. B. 226; Harden v. Fahrenkopf & Reufle, 229 App. Div. 1; 185 S. B. 468; Orlando v. Snider Packing Corp., 230 App. Div. 557; 185 S. B. 220; Genovese v. Dorff, Inc., 262 App. Div. 923, July 2, 1941.

Whether or not the carrier was entitled to have an autopsy performed figured in Rosawitz v. Ficks Reed Co., 247 App. Div. 918; 272 N. Y. Rep. 654; 15 Ind. Bul. 445, in which the courts affirmed award.

Disability record may be made part of death record: Hill v. Ancram Paper Mills, 202 App. Div. 36; 118 S. B. 153; Timpa v. Thompson-Starrett Co., 31 S. D. R. 175; 211 App. Div. 827; 140 S. B. 217, 219; Wolf v. G. E. Co., 214 App. Div. 845; 149 S. B. 250; but is not *res judicata:* Hannon v. N. Y. State Rys., Case No. 6310490; 214 App. Div. 839; 149 S. B. 251; see carrier's brief in Volk v. Gretsch & Co., 188 App. Div. 942; 149 S. B. 251. See note relative to disability and death claims being separate and distinct under § 25-a, above.

The Attorney-General critcized the improper use of hospital records as evidence in Travers v. N. Y. Last Co., D. C., No. 2249223; 215 App. Div. 852; 149 S. B. 252.

Hearsay. The Appellate Division having upheld an award upon hearsay evidence, the Court of Appeals, reversing the decision, held that former § 68, now § 118, simply allows the Commission in its discretion to accept hearsay or any other kind of evidence but does not authorize it to make an award unsupported by "a residuum of legal evidence": Carroll v. Knickerbocker Ice Co., 169 App. Div. 450; 218 N. Y. 435; 81 S. B. 381.

In line with the Carroll opinion are the later opinions and decisions in Belcher v. Carthage Machine Co., 224 N. Y. 326; 95 S. B. 287; Hansen v. Turner Construction Co., 224 N. Y. 331; 95 S. B. 289; Vassilakis v. Fairfax Hotel Co., 193 App. Div. 829; 114 S. B. 81; Jack v. Morrow Mfg. Co., 194 App. Div. 565; 106 S. B. 97; McHale v. Sheffield Farms Co., 193 App. Div. 541; 106 S. B. 212; Drothleff v. Union News Co., 207 App. Div. 86; 123 S. B. 106; Vilim v. Schwartz, 209 App. Div. 778; 133 S. B. 219; Van Cise v. Standard Oil Co., 209 App. Div. 838; affd., 239 N. Y. Rep. 587; 133 S. B. 217; Meehan v. Dutton Lumber Co., 210 App. Div. 540; 133 S. B. 218; Kemp v. Sterling Engine Co., 230 App. Div. 546; 10 Ind. Bul. 58; Montgomery v. Bartholomay Milk Co., 234 App. Div. 811; affd., 260 N. Y. Rep. 664; 185 S. B. 473. The Appellate Division reversed the Industrial Board's denial of a claim and remitted the case finding that as a matter of law the facts and inferences most favorable to claimant, if accepted by the Board, were sufficient to corroborate hearsay declarations as to accident: Love v. Thatcher Mfg. Co., 251 App. Div. 47; motion to dismiss appeal granted, 275 N. Y. Rep. 533; 204 S. B. 572.

For additional cases involving hearsay corroboration, see 204 S. B. 569.

Admissions of the employer in the form of his report, or other form, corroborate hearsay: Anthus v. Rail Joint Co., 193 App. Div. 571; 231 N. Y. Rep. 557; 114 S. B. 143; cases in 140 S. B. 219, 220; 149 S. B. 254, 255; Werenjchik v. Ulen Contracting Corp., 255 N. Y. 56, 411; 185 S. B. 134, 546; and Jacobson v. Harden Contratcing Co., 232 App. Div. 857; 185 S. B. 468.

The Commission can make an award upon hearsay evidence alone, if the employer has introduced no contradictory evidence: Hanley v. N. Y. Central R. R. Co., Death Case No. 4854; reversed by Appellate Division upon interstate grounds, 192 App. Div. 936; 98 S. B. 84, 85.

The courts will not hold hearsay incompetent, if the insurance carrier has introduced it or has received it without objection at the Commission's hearings: Hernon v. Holohan, 182 App. Div. 126; 87 S. B. 46.

Inference. Proof that a truck driver with preexisting heart disease cranked a truck and thereafter collapsed due to a heart attack was held sufficient to sustain an inference of accidental death: Green v. Geiger, 255 App. Div. 903; 280 N. Y. Rep. 610; 204 S. B. 52.

Jeweler's assistant was found unconscious during work hours on employment premises. Ensuing death was attributed to swallowing cyanide, a colorless solution used for cleaning jewelry, which was stored near the sink. The court held that there was evidence from which an inference could be drawn that the death was accidental and that such evidence supported the presumption against suicide. Sullivan v. Casimir Co., Inc., 258 App. Div. 830; 204 S. B. 371.

Watchman was found murdered on the employer's premises. A co-employee who pleaded guilty to the murder, in second degree, testified that he assaulted the decedent because of the latter's remarks concerning his girl friend and that thereafter he robbed the safe to divert suspicion from himself. The court held that the assailant's testimony was unworthy of belief and that the inferences to be drawn from conditions found indicated that the decedent was killed in the performance of his duties: Heinroth v. Elk Transportation Corp., Inc., 259 App. Div. 944; 204 S. B. 578.

PROCEDURE

The courts, with opinion in each case, have reversed and remitted award proceedings because the Commission has granted compensation in excess of loss of use testified to by experts: Clayton v. Foundation Co., 193 App. Div. 822; 114 S. B. 35; Schermerhorn v. G. E. Co., 195 App. Div. 670; 114 S. B. 38; has made alternative findings: Lorchitsky v. Gotham F. B. Co., 230 N. Y. 8; 123 S. B. 99; Greenberg v. Greenberg, 193 App. Div. 574; 118 S. B. 138; or findings otherwise defective: Brezzenski v. Crenshaw Engineering Co., 188 App. Div. 511; 97 S. B. 26; Weighton v. Austin Co., 205 App. Div. 159; 118 S. B. 156; 123 S. B. 14; Strzyckowski v. American 3 Way-Luxfer Prism Co., 230 App. Div. 632; 185 S. B. 90; has not given an employer or carrier opportunity to present his case: Davis v. Butler, 194 App. Div. 58; 114 S. B. 137; Duffield v. Quogue Field Club, 217 App. Div. 796; 149 S. B. 202; Price v. U. S. Rubber Reclaiming Co., 218 App. Div. 791; 149 S. B. 248; Rusciano v. Rusciano, 226 App. Div. 836; 8 Ind. Bul. 633; has refused adjournment: Archangelo v. Gallo & Laguidara, 177 App. Div. 31; 95 S. B. 66; Reichelson v. Steinberg & Dobin, 206 App. Div. 640; 123 S. B. 97; and has denied the right to cross-examine: Davis v. Butler, 194 App. Div. 58; 114 S. B. 137; Jack v. Morrow Mfg. Co., 194 App. Div. 565; 106 S. B. 199; Stimal v. Jewett & Co., 198 App. Div. 427; 118 S. B. 89; Gannuzzi v. Foxwood Construction Co., 211 App. Div. 637; 140 S. B. 217; and Mose v. Tupper Lake Chemical Co., 227 App. Div. 674; 185 S. B. 171; and Springer v. Van Dorn, 247 App. Div. 436; 204 S. B. 580.

Right to adjournment figured in Pusterio v. Star Show Case Co., 254 N. Y. Rep. 534; 185 S. B. 62; Thye v. R. W. S. Corp., 253 App. Div. 853; 204 S. B. 12; Liebman v. Cordell Cafeteria, Inc., 261 App. Div. 1029, 1111; and Smith v. Rosoff Tunnel, Inc., 259 App. Div. 617; 204 S. B. 582; and right to introduce alleged newly discovered evidence in Falk v. Midland Dairy Co., 273 N. Y. Rep. 616; 16 Ind. Bul. 165.

Award was reversed and claim remitted for the purpose of taking proof offered by the employer and carrier as to the earning capacity of claimant: Sammis v. Queens Borough G. & E. Co., 257 App. Div. 58; 204 S. B. 285.

The courts have criticized the commission's practice of referring to the opinion of an individual commissioner as part of its findings: Lorchitsky v. Gotham F. B. Co., 230 N. Y. 8; 123 S. B. 99; Bowman v. Gibson, 194 App. Div. 855; 106 S. B. 214. The Appellate Division affirmed an award upon ground that appellants by raising specific objections before the commission had waived all other questions: Nastacos v. Orfan, 198 App. Div. 951; 118 S. B. 147.

A carrier's rights independent of the employer insured by it, including right to object that claim has not been filed within a year, are outlined in Cheeseman v. Cheeseman, 236 N. Y. 47, reversing 203 App. Div. 533; 123 S. B. 93–96.

The Appellate Division criticized the trial of a case by a referee as not being adequate: Gruttaduria v. Imperial Metal Mfg. Co., 250 App. Div. 242; 204 S. B. 288; charged the Industrial Board with alleged failure to properly consider claims against the state insurance fund: Summers v. Mohawk Valley Roofing Co., 245 App. Div. 412; 204 S. B. 575; criticized a referee for permitting a physician to decide whether or not he should give evidence: Ingalls v. Herrick, 248 App. Div. 445; 204 S. B. 157; for improper exclusion of medical proof: Petak v. Macy & Co., 254 App. Div. 617; Smith v. Rosoff Tunnel, Inc., 259 App. Div. 617; 204 S. B. 582; and held that the Board should determine a case and not delegate this duty to physicians: Dillon v. Schapp Beef Co., 254 App. Div. 790; 204 S. B. 150.

The Appellate Division reproved a deputy commissioner for his conduct in examining witnesses: Vissaggio v. N. Y. Consolidated R. R. Co., 188 App. Div. 49; 95 S. B. 296; and reversed awards because of the conduct of the referee: Pflug v. Roesch & Klinck, 229 App. Div. 54; 177 S. B. 108; De Lorme v. General Ice Cream Corp., 227 App. Div. 832; 185 S. B. 147; Altadonna v. Dwyer, 206 App. Div. 632; 123 S. B. 97; Lewkowitz v. Cohen, 202 App. Div. 769; 114 S. B. 140; Majors v. Forrestal Co., 244 App. Div. 856; 14 Ind. Bul. 173; see also Fostner v. Morawitz, 215 App. Div. 176; 140 S. B. 142; Muir v. Newton Falls Paper Co., 231 App. Div. 769; 185 S. B. 462; Riddell v. Miller Fountain Co., 235 App. Div. 753; 11 Ind. Bul. 236; De Crescenzo v. Apex Concrete Co., 246 App. Div. 662; 14 Ind. Bul. 314; and references of 162 S. B. 174, 175.

The court affirmed award notwithstanding its disapproval of a referee's conduct where the Industrial Board had granted review and opportunity to present evidence: Veres v. Lumen Bearing Co., 255 App. Div. 171; 204 S. B. 581. See also Rizzo v. Lisk, 256 App. Div. 867; 204 S. B. 196; Smith v. Rosoff Tunnel, Inc., 259 App. Div. 617; 204 S. B. 582.

Board Member has power to act for the Board in a review of a referee's decision: Algeri v. Brady & Gioe, Inc., 253 App. Div. 907; 204 S. B. 585.

§ 119. **Subpoenas.** A subpoena [1]or a subpoena duces tecum may be signed and issued by the commissioner, deputy commissioner, member of the board, referee or such other officer as may be designated by the commissioner. Failure to obey such subpoena shall constitute a contempt as provided by the civil practice act. [*Drafted from former* § 69 *and numbered* § 119 *by L.* 1922, *ch.* 615; *am'd by L.* 1926, *ch.* 257.]

[1] Words "or a subpoena duces tecum" inserted by L. 1926, ch. 257.

For enforcement of physician subpoenas, see Rule 10, appended below.

See Civil Practice Act, §§ 403–414, relative to subpoenas. See also note under § 26 above, relative to § 773-a of the Civil Practice Act. Use of subpoenas is interpreted by Frisch v. Eagle W. & S. Co., 221 App. Div. 825; 161 S. B. 227; Wiznitzer v. Asner, 222 App. Div. 784; 161 S. B. 228; Greenberg v. Fancy Case Co., 226 App. Div. 835; 8 Ind. Bul. 632, and Opinion of Attorney-General, January 24, 1933. In absence of agreement to testify for a stipulated fee a witness may not be compelled to testify as an expert, but, having testified as such, may be subjected to cross-examination under subpoena: Opinion of Attorney-General, February 13, 1935. This § 119 does not confer upon an attorney the right to issue a subpoena: Opinion of Attorney-General, April 30, 1935. For an instance of attachment of a witness see Hirschfield v. Cook, 107 Misc. 130; affd., 227 N. Y. 297.

§ 120. **Fees of witnesses.** Each witness who appears in obedience to a subpeona shall be entitled to the same fees as witnesses in a civil action in the supreme court. [*Drafted from former* § 71 *and numbered* § 120 *by L.* 1922, *ch.* 615.]

Compare subd. (2) of § 13-f, above.

This section does not reproduce the provision of former § 71 relative to fees of witnesses subpoenaed at the instance of parties other than department officers.

Physicians not authorized by the Commissioner to treat claimants may collect fees for examining, participating in examinations or testifying at hearings: Opinion of Attorney-General, August 18, 1936.

§ 121. **Depositions.** The [1]commissioner or board may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the supreme court. [*Former* § 72, *renumbered* § 121 *and am'd by L.* 1922, *ch.* 615.]

[1] Words "commissioner or board" substituted for word "commission" by L. 1922, ch. 615.

Compare § 21, subd. 5, above.

This section is permissive and not restrictive relative to the Commission's authority under former § 68, now § 118; it does not exclude an ordinary affidavit: Moran v. Rodgers & Haggerty, 180 App. Div. 821; 95 S. B. 125, 294. The taking of depositions is governed by the Civil Practice Act, §§ 288–312. For testimony of a witness residing within the state by affidavit see McCarthy v. Walsh Construction Co., 254 N. Y. Rep. 608; 185 S. B. 466, 467.

§ 121-a. **Proof of dependency in foreign countries.** In cases involving the dependency of aliens residing in foreign countries, transcripts of birth or marriage certificates, also documents and affidavits, certified by a local official or local magistrate and authenticated as to such official or magistrate by the secretary of state or other official having charge of foreign affairs, [1]or a United States consul, in said foreign country, [2]may be received in evidence, [3]but in all such cases proof of present existence and of dependency may be made by the personal appearance of each and all persons claiming relationship to or dependence upon a deceased worker under the provisions of sections sixteen and seventeen of this chapter, before a diplomatic or consular officer of the United States, and statements made to or evidence presented before such diplomatic or consular officer under oath may be received in evidence in whole or in part by the board upon any such claim. Questions regarding admissibility and adequacy of evidence arising in connection with proceedings before the consul shall be determined by the board. The board may by rule prescribe the conditions under which proofs other than personal appearance before a diplomatic or consular officer of the United States may be accepted as proof of the facts of existence, relationship and dependency. [*Added by L.* 1923, *ch.* 46; *am'd by L.* 1929, *ch.* 300; *L.* 1941, *ch.* 492.]

[1] Words "or a United States consul" inserted by L. 1929, ch. 300.

[2] Word "may" substituted for word "shall" by L. 1941, ch. 492.

[3] Words "for the purpose of proving dependency" eliminated and remainder of section added by L. 1941, ch. 492.

Compare § 17, above, and § 398 of the Civil Practice Act, as amended by L. 1933, ch. 363; 180 S. B. 64.

Adequacy of dependency proofs has caused most of the controversy concerning foreign claimants; court opinions defining the question have been handed down in Werenjchik v. Ulen Contracting Corp., 229 App. Div. 36; 255 N. Y. 56, 411; 185 S. B. 137–139 (Russia); Moran v. Rodgers & Haggerty, 180 App. Div. 821; 95 S. B. 125; Drummond v. Isbell-Porter Co., 188 App. Div. 374; 95 S. B. 131; Pifumer v. Rheinstein & Haas, 187 App. Div. 821; 95 S. B. 128; Bonnano v. Metz Bros. Co., 188 App. Div. 380; 199 App. Div. 947; 95 S. B. 129; Profita v. Retsof Mining Co., 188 App. Div. 383; 95 S. B. 130; Cianoa v. West End Paper Co., 188 App. Div. 384; 95 S. B. 131; Hansen v. Flinn-O'Rourke Co., 21 S. D. R. 354; 5 Bul. 22, 105; 192 App. Div. 878; 114 S. B. 86; Eretza v. Fort Montgomery Iron Works, 21 S. D. R. 433; 5 Bul. 105; 193 App. Div. 817; 114 S. B. 80; Vassilakis v. Fairfax Hotel Co., 193 App. Div. 829; 114 S. B. 81; Grillo v. Sherman-Stalter Co., 195 App. Div. 362; 231 N. Y. Rep. 621; 114 S. B. 84; Di Ionna v. Terry & Tench Co., 203 App. Div. 270; 123 S. B. 37; and Paola v. Porter Bros., 209 App. Div. 716; 133 S. B. 186. See also Geisberger v. Houde Engineering Corp., 267 N. Y. Rep. 575; 185 S. B. 150.

Testimony, affidavits and depositions alleging support for a year, as required by § 17, establish such support if the employer or carrier offers no rebuttal: Wagner v. Wilson & Co., 251 N. Y. 67 (Record, Folio 354); 185 S. B. 149; for awards based on affidavits see Moran v. Rodgers & Hagerty, 180 App. Div. 821; 95 S. B. 125; 185 S. B. 467 (opinion) and McMorrow v. N. Y. Consolidated R. R. Co., 231 App. Div. 783; proof of support for a year was held not to be sufficient in Schaubel v. Simons, Stewart & Foy, 261 N. Y. Rep. 544; 185 S. B. 149; Mouritzen v. Richenecker, 226 App. Div. 711; 8 Ind. Bul. 579; Aun v. Josman, 229 App. Div. 816; 9 Ind. Bul. 237; and Caminita v. Arnold Concrete Co., 231 App. Div. 771; 10 Ind. Bul. 63; such proof is not requisite for claimants residing in Canada: Mallory v. American Bridge Co., 261 N. Y. Rep. 701; 12 Ind. Bul. 100.

Relative to validity of authentication under this section by officials of Soviet Russia, see Werenjchik v. Ulen Contracting Corp., 229 App. Div. 36; 255 N. Y. 56, 411; 185 S. B. 137–139; Kogelets v. National Stables, 240 App. Div. 741; 185 S. B. 139; 250 App. Div. 803; 16 Ind. Bul. 130.

§ 122. **Transcripts.** A copy of the testimony, evidence and procedure of any investigation, or a particular part thereof, transcribed by a stenographer in the employ of the department and certified by such stenographer to be true and correct may be received in evidence with the same effect as if such stenographer were present and testifying to the facts so certified. A copy of such transcript shall be furnished to any party upon payment of the fee for transcripts of similar minutes in the supreme court. [*Former* § 73, *redrafted without substantive change and renumbered* § 122 *by L.* 1922, *ch.* 615.]

§ 123. **Jurisdiction of [1]department to be continuing.** The power and jurisdiction of the [1]department over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings, [2]awards, decisions or orders relating thereto, as in its opinion may be just, [3]except that, where the employer has secured the payment of compensation in accordance with the provisions of section fifty of this chapter, no claim for compensation or for death benefits that has been disallowed after a trial on the merits, or that has been otherwise disposed of without an award after the parties in interest have been given due notice of hearing or hearings and opportunity to be heard and for which no determination was made on the merits, shall be reopened after a lapse of seven years from the date of the accident or death. Nor

shall any award of compensation or death benefits be made against the special fund provided in section twenty-five-a of this chapter or against an employer or an insurance carrier where application therefor is made after a lapse of eighteen years from the date of the injury or death and also a lapse of eight years from the date of the last payment of compensation. [*Former* § 74, *renumbered* § 123 *and am'd by L.* 1922, *ch.* 615; *L.* 1940, *ch.* 686.]

[1] Word "department" substituted for word "commission" by L. 1922, ch. 615.
[2] Words "awards, decisions" inserted by L. 1922, ch. 615.
[3] Remainder of section added by L. 1940, ch. 686.

Disability compensation and death benefits awarded by the Industrial Board in the death case based on a finding that deceased had suffered an activation of tuberculosis were affirmed even though an earlier finding to the contrary had been made by a referee in the disability case: Nydahl v. Lackawanna Steel Const. Corp., 254 App. Div. 610; 204 S. B. 584.

Industrial Board's action in reviewing a case seven months after its disallowance by a referee and making an award without taking further evidence except a verified medical report by a State medical examiner held proper: D'Anneo v. Sperry Gyroscope Co., 259 App. Div. 766; 204 S. B. 584.

Relative to the Commission's power to revise its awards and decisions, whether they have been subject of court action upon appeal or not, § 15, subd. 6-a, and §§ 22, 23, and 123 are to be read together; see notes under § 22.

§ 124. **Blank forms.** The commissioner shall prescribe and distribute such blank forms as the administration of this chapter requires, including forms of notices and claims and forms for proving injury, death, medical or other attendance or treatment, employment and wage earnings. Insurance carriers shall constantly keep on hand at their own expense a sufficient supply of such blanks. [*Drafted from former* § 76 *and numbered* § 124 *by L.* 1922, *ch.* 615.]

This new section differs from former § 76 in that it requires carriers instead of employers to keep blanks on hand and puts the expense of providing them upon the carriers instead of the department.

§ 125. **Undertakings.** The commissioner may by regulation provide for the giving of undertakings by all subordinates who are empowered by this chapter to receive and disburse moneys, to be approved as to form by the attorney-general and as to sufficiency by the comptroller. [*As added by L.* 1922, *ch.* 615.]

§ 126. **Expenses of administering workmen's compensation law.** The commissioner [1]and department of audit and control annually as soon as practicable after July first shall ascertain the total amount of expenses incurred by the department [2]during the preceding fiscal year in connection with the administration of the workmen's compensation law. [3]An itemized statement of the expenses so ascertained shall be open to public inspection in the office of the commissioner for thirty days after notice to all insurance carriers and to all employers permitted to pay com-

pensation directly affected thereby before the commissioner shall make an assessment upon such carriers and employers as hereinafter provided. The commissioner shall keep an accurate record of all hearings held and the industrial board, in its discretion, may assess against each insurance carrier five dollars for each adjourned hearing held at the request of the insurance carrier. [4] Where the decision of a referee is affirmed by the industrial board upon review, the commissioner shall assess against each insurance carrier or employer seeking such review the sum of ten dollars and may assess against any other party the sum of five dollars. The fund so created, [5]from these assessments shall be applied toward the total amount of the expenses ascertained as above. If there be any deficiency the commissioner shall thereupon assess upon and collect from each insurance carrier, including the state insurance fund [6]and any county, city, town, village or other political subdivision, failing to secure compensation pursuant to subdivisions one and two of section fifty, the proportion of such expense that the total compensation or payments made by such carrier in such year bore to the total compensation or payments made by all insurance carriers. The amounts so secured shall be transferred to the state treasury to reimburse it for this portion of the expense of administering this chapter. [*Former* § 77, *renumbered* § 126 *and am'd by L.* 1922, *ch.* 615; *am'd by L.* 1928, *ch.* 753; *and L.* 1933, *ch.* 393.]

[1] Words "and department of audit and control" inserted by L. 1928, ch. 753.
[2] Words "of labor" stricken out by L. 1922, ch. 615.
[3] Words "An itemized . . . provided" inserted by L. 1928, ch. 753.
[4] Sentence "Where the decision . . . five dollars" inserted by L. 1933, ch. 393.
[5] Words "from these assessments" inserted by L. 1933, ch. 393.
[6] Words "and any . . . section fifty" inserted by L. 1922, ch. 615.

Compare § 88. Under § 25 one-half of the assessment against an employer or carrier failing to report stoppage of compensation payment is applicable to the department's expenses.

An assessment due the Department of Labor from a carrier is a valid prior claim in liquidation proceedings but is subordinate to claims of injured employees: Opinions of Attorney-General, February 28, 1924, and February 21, 1934.

Relative to assessment of companies in hands of receivers and satisfaction of assessment out of deposited securities of self-insurers, see Opinion of Attorney-General, November 22, 1932, in Report of Industrial Comr., 1932, pp. 113–117.

§ 127. **Construction.** This chapter shall be read and construed in connection with the labor law. [*As added by L.* 1922, *ch.* 615.]

Article two of the Labor Law prescribes the organization, powers and procedure of the department of labor relative to workmen's compensation and other subjects. Relative to application of a Labor Law definition to a workmen's compensation case, see Brew v. Evey Holding Corp., 238 App. Div. 885; 12 Ind. Bul. 80; Seymour v. Odd Fellows Home, 267 N. Y. 354; 188 S. B. 33.

Section 27 of the Labor Law was cited as authority for the proposition that one member of the Industrial Board is empowered to act for the Board in a review of a referee's decision: Algeri v. Brady & Gloe, Inc., 255 App. Div. 907; 204 S. B. 585.

§ 128. **Unconstitutional provisions.** If any section or provision of this chapter be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the chapter as a whole or any part thereof other than the part so decided to be unconstitutional or invalid. [*Former* § 118, *renumbered* § 128 *by L.* 1922, *ch.* 615.]

§ 129. **Actions or causes of action pending.** This act shall not affect any action pending or cause of action existing or which accrued prior to July first, nineteen hundred and [1]twenty-two. [*Former* § 119, *renumbered* § 129 *and am'd by L.* 1922, *ch.* 615.]

[1] Word "twenty-two" substituted for word "fourteen" by L. 1922, ch. 615.

§ 130. **Workmen's compensation premiums shall be deemed preferred claims.** All premiums and interest charges on account of policies insuring employers against liability under this chapter which may be due to the state insurance fund, or any stock corporation or mutual association authorized to transact the business of insurance in this state, and all judgments recovered by the state insurance fund or any such insurance corporation or association against any employer on actions brought under any such policy, shall be deemed preferred claims in all insolvency or bankruptcy proceedings, trustee proceedings for administration of estates and receiverships involving the employer liable therefor or the property of such employer, provided however that claims for wages shall receive prior preference in all such proceedings. [*As added by L.* 1931, *ch.* 508, *effective April* 20, 1931.]

Priority of creditor's claim under this § 130 was upheld, though accrued before April 20, 1931, but the National Bankruptcy Act was held to control distribution of bankrupt estates to the exclusion of state statutes: In re Inland Dredging Corp., 61 F. (2d) 765; writ of certiorari denied, 288 U. S. 611; 185 S. B. 361. Compare § 34, preference of compensation, and note thereunder, above.

Marshalling and distribution of insolvent decedents' estates are "insolvency proceedings" and the administration of such decedents' estates is "trustee proceedings for administration of estates" within the meaning of this § 130: Epstein-Estate, Matter of, 154 Misc. 776; 185 S. B. 360.

Liens under § 13 of the Lien Law have priority over judgments for unpaid workmen's compensation premiums: Corbin-Kellogg Agency v. Tasker, 248 App. Div. 58; 15 Ind. Bul. 357.

§ 131. **Payroll records.** Every insured employer shall keep a true and accurate record of the number of his employees and the wages paid by him for a period of four years after each entry therein, which records shall be open to inspection at any time, and as often as may be necessary to verify the same by investigators of the division of workmen's compensation of the department of labor, by the authorized auditors, accountants or inspectors of the carrier with whom the employer is insured, or by the authorized auditors, accountants or inspectors of any workmen's compensa-

tion insurance rating board or bureau operating under the authority of the insurance law and of which board or bureau such carrier is a member. Any and all records required by law to be kept by such employer upon which the employer makes or files a return concerning wages paid to employees shall form part of the records described in this section and shall be open to inspection in the same manner as provided in this section. Any employer who shall fail to keep such records or who shall falsify any such records shall be guilty of a misdemeanor. [*Added by L.* 1939, *ch.* 504.]

§ 132. **Criminal prosecution.** The attorney-general may prosecute every person charged with the commission of a criminal offense in violation of this chapter, or of any rule, regulation or order made thereunder, or in violation of the laws of this state, applicable to or arising out of any provision of this chapter or any rule, regulation or order made thereunder. [*Added by L.* 1940, *ch.* 296.]

§ 133. **Refunds and credits.** In any case where an award, an assessment or a penalty has been made and paid directly into the state treasury or into one of the special funds created under the provisions of this chapter, and it is thereafter determined by the industrial commissioner, the industrial board or by a court of competent jurisdiction that such award, assessment or penalty, or any portion thereof was erroneously, illegally, or improperly made, the employer or his insurance carrier who made any such payment may be reimbursed, or allowed a credit, from any moneys in the state treasury not otherwise appropriated or from the special fund to which the payment had been made, for such amount, without costs or interest, as may be determined by the industrial commissioner, the industrial board or by a court of competent jurisdiction; provided, however, that a request for such reimbursement is filed with the industrial commissioner within three months after such determination, on the audit and warrant of the comptroller on certification of the industrial commissioner. [*Former* § 132, *added by L.* 1940, *ch.* 521, *renumbered* § 133 *by L.* 1941, *ch.* 20.]

ARTICLE 8

Laws Repealed; When to Take Effect

[*This Article* 8 *is former Article* 7 *renumbered by L.* 1935, *ch.* 255, § 2.]

Section 140. Laws repealed.
141. When to take effect.

§ 140. **Laws repealed.** Article fourteen-a and sections two hundred and fifteen to two hundred and nineteen-g, both inclusive, of chapter thirty-six of the laws of nineteen hundred and nine, as [1]added by chapter six hundred and seventy-four of the laws of nineteen hundred and ten, are hereby repealed. [*Former* § 130, *renumbered* § 140 *and am'd by L.* 1922, *ch.* 615.]

[1] Word "added" substituted for word "amended" by L. 1922, ch. 615.

Article 14-a, identical with §§ 215–219-g, constituting the first workmen's compensation law of New York, was declared unconstitutional in Ives v. South Buffalo Railway Co., 201 N. Y. 271 (1911).

§ 141. **When to take effect.** This chapter [1]as amended shall take effect [2]July first, nineteen hundred and twenty-two. [*Former* § 131 *renumbered* § 141 *and am'd by L.* 1922, *ch.* 615.]

[1] Words "as amended" inserted by L. 1922, ch. 615.

[2] Words "July first, nineteen hundred and twenty-two," substituted for words, "immediately, provided that the application of this chapter as between employers and employees and the payment of compensation for injuries to employees or their dependents, in case of death, shall take effect July first, nineteen hundred and fourteen, but payments into the state insurance fund may be made prior to July first, nineteen hundred and fourteen."

See table of effective dates on following pages.

The original and amendatory acts, with their times of taking effect, are as follows:

Year	Chapter	When Effective
1913	816	Jan. 1, 1914
		July 1, 1914
1914	41	Mar. 16, 1914
		July 1, 1914
1914	316	Apr. 14, 1914
1915	167	Apr. 1, 1915
1915	168	Apr. 1, 1915
1915	615	May 12, 1915
1915	674	May 22, 1915
1916	622	June 1, 1916
1917	705	July 1, 1917
1918	249	Apr. 17, 1918
1918	633	May 13, 1918
1918	634	May 13, 1918
1918	635	May 13, 1918
1919	458	May 5, 1919
1919	498	May 9, 1919
1919	629	May 14, 1919
1920	281	Apr. 19, 1920
1920	527	July 1, 1920
1920	529	May 5, 1920
1920	530	July 1, 1920
1920	532	May 5, 1920
1920	533	May 5, 1920
1920	534	May 5, 1920
1920	536	May 5, 1920
1920	538	May 5, 1920
1920	760	May 13, 1920
1921	60	Mar. 9, 1921
1921	539	May 3, 1921
1921	540	May 3, 1921
1922	615	July 1, 1922
1923	46	Mar. 12, 1923
1923	334	May 4, 1923
1923	566	May 21, 1923
1923	567	May 21, 1923
1923	568	May 21, 1923
1923	571	May 21, 1923
1923	572	July 1, 1923
1924	317	July 1, 1924
1924	318	Jan. 1, 1925
1924	319	July 1, 1924
1924	320	July 1, 1924
1924	499	Apr. 25, 1924
1924	500	July 1, 1924
1924	658	May 7, 1924
1925	656	Apr. 11, 1925
1925	657	Apr. 11, 1925
1925	658	Apr. 11, 1925
1925	660	Apr. 11, 1925
1926	256	Apr. 5, 1926
1926	257	Apr. 5, 1926
1926	258	Apr. 5, 1926
1926	260	Apr. 6, 1926
1926	261	Apr. 6, 1926
1926	262	Apr. 6, 1926
1926	532	Apr. 21, 1926
1926	533	Apr. 21, 1926
1926	748	May 3, 1926
1927	493	Jan. 1, 1928
1927	494	Mar. 31, 1927
1927	496	July 1, 1927
1927	497	Mar. 31, 1927
1927	553	July 1, 1927
1927	554	Oct. 1, 1927
1927	555	Oct. 1, 1927
1927	556	Oct. 1, 1927
1927	557	July 1, 1927
1927	558	Oct. 1, 1927
1928	584	May 1, 1928
1928	749	May 1, 1928
1928	750	Mar. 29, 1928
1928	752	Mar. 29, 1928
1928	753	Mar. 29, 1928
1928	754	July 1, 1928
1928	755	Oct. 1, 1928
1929	64	Mar. 6, 1929
1929	298	Oct. 1, 1929
1929	299	Apr. 5, 1929
1929	300	Apr. 5, 1929
1929	301	Apr. 5, 1929
1929	302	Apr. 5, 1929
1929	303	Apr. 5, 1929
1929	304	July 1, 1929
1929	305	July 1, 1929
1929	564	July 1, 1929
1929	702	Oct. 1, 1929
1930	60	Oct. 1, 1930
1930	183	Mar. 26, 1930
1930	184	Mar. 26, 1930
1930	316	July 1, 1930
1930	521	Apr. 16, 1930
1930	609	Apr. 19, 1930
1930	698	Apr. 23, 1930
1931	199	Mar. 30, 1931
1931	291	July 1, 1931
1931	292	July 1, 1931
1931	344	July 1, 1931
1931	385	Apr. 13, 1931
1931	508	Apr. 20, 1931
1931	510	Apr. 20, 1931
1932	200	Mar. 15, 1932
1932	201	Mar. 15, 1932
1932	202	Mar. 15, 1932
1932	203	Mar. 15, 1932
1932	248	Mar. 17, 1932
1932	488	Mar. 28, 1932
1933	384	Apr. 24, 1933
1933	393	July 1, 1933
1933	774	Aug. 26, 1933
1934	290	July 1, 1934
1934	694	May 21, 1934

Year	Chapter	When Effective
1934	695	May 21, 1934
1934	735	May 21, 1934
1934	743	Sept. 1, 1934
1934	769	May 21, 1934
1935	254	Sept. 1, 1935
1935	255	Mar. 27, 1935
1935	258	July 1, 1935
1935	327	Apr. 8, 1935
1935	328	Apr. 8, 1935
1935	329	Apr. 8, 1935
1935	384	Apr. 11, 1935
1935	482	Apr. 25, 1935
1935	552	Apr. 29, 1935
1935	603	Apr. 29, 1935
1935	648	May 2, 1935
1935	649	May 2, 1935
1935	656	July 1, 1935
1935	660	May 2, 1935
1935	661	July 1, 1935
1935	680	May 3, 1935
1935	780	May 6, 1935
1935	793	May 7, 1935
1935	849	July 1, 1935
1935	930	May 16, 1935
1936	217	Mar. 31, 1936
1936	711	May 25, 1936
1936	887	June 6, 1936
1936	888	June 6, 1936
1937	86	July 1, 1937
1937	87	Mar. 19, 1937
1937	106	July 1, 1937
1937	108	Mar. 24, 1937
1937	110	July 1, 1937
1937	251	Apr. 19, 1937
1937	271	July 1, 1937
1937	559	May 22, 1937
1937	563	July 1, 1937
1937	565	May 24, 1937
1937	574	July 1, 1937
1937	684	Sept. 1, 1937
1937	811	July 1, 1937
1937	925	June 6, 1937
1938	585	July 1, 1938
1938	657	Apr. 11, 1938
1939	98	Mar. 22, 1939
1939	99	Mar. 22, 1939
1939	100	Mar. 22, 1939
1939	107	Mar. 23, 1939
1939	241	July 1, 1939
1939	251	Apr. 10, 1939
1939	252	Apr. 10, 1939
1939	271	Apr. 11, 1939
1939	288	Apr. 13, 1939
1939	404	July 1, 1939
1939	504	July 1, 1939
1939	517	July 1, 1939
1939	525	July 1, 1939
1939	533	May 26, 1939
1939	540	May 26, 1939
1939	541	May 26, 1939
1939	667	June 3, 1939* July 1, 1936
1939	668	June 3, 1939
1939	676	July 1, 1939
1939	732	July 1, 1939
1939	937	July 1, 1939
1940	60	July 1, 1940
1940	132	July 1, 1940
1940	159	Mar. 13, 1940
1940	225	Mar. 21, 1940
1940	296	Apr. 8, 1940
1940	360	Apr. 10, 1940
1940	435	Apr. 13, 1940
1940	483	Apr. 14, 1940
1940	521	July 1, 1940
1940	542	July 1, 1940
1940	548	Apr. 16, 1940
1940	686	July 1, 1940†
1941	20	Feb. 17, 1941
1941	221	July 1, 1941
1941	222	July 1, 1941
1941	243	Apr. 11, 1941
1941	274	Apr. 12, 1941
1941	277	July 1, 1941
1941	306	July 1, 1941
1941	307	July 1, 1941
1941	325	Apr. 13, 1941
1941	373	Apr. 14, 1941
1941	376	Apr. 12, 1941
1941	444	Apr. 15, 1941
1941	492	Apr. 17, 1941
1941	588	Apr. 20, 1941
1941	619	Apr. 21, 1941
1941	639	Apr. 21, 1941
1941	712	July 1, 1941
1941	875	Apr. 29, 1941

* Laws of 1939, ch. 667, § 2, provided as follows: "This act shall take effect immediately and shall be retroactive and apply to all such payments due the state insurance fund subsequent to the first day of July, nineteen hundred thirty-six."

† Amendments effected in § 15, Subd. 6-a, §§ 22, 25-a, and 123 by L. 1940, ch. 686, "shall take effect July 1, 1940, except that no right which exists on said date to receive compensation or death benefits shall be barred by reason of the limitations contained in Subd. 6 of § 25-a or § 123 of this chapter, as hereby amended, until one hundred and eighty days after said date."

APPENDIX

RULES INCLUDED

PAGE

Rules and Procedure of Industrial Commissioner Relative to Medical Care of Injured Employees Under §§ 13–13-j of the Workmen's Compensation Law 298

Rules of the Industrial Council Regulating Procedure Before Medical Societies, Etc., Under §§ 13-b and 13-d of the Workmen's Compensation Law and § 10-a of the Labor Law..... 302

Rules and Procedure of the Industrial Board under the Workmen's Compensation Law 304

STATE OF NEW YORK

DEPARTMENT OF LABOR

INDUSTRIAL COMMISSIONER

RULES AND PROCEDURE

UNDER §§ 13–13-j OF THE

WORKMEN'S COMPENSATION LAW

Promulgated by the Industrial Commissioner of the State of New York pursuant to Chapter 258 of the Laws of 1935, as amended to August 15, 1941.

Note.—*Rules 1 and 2 have been superseded by the "Rules of the Industrial Council Regulating Procedure before Medical Societies or Compensation Boards of Medical Societies, and before the Industrial Council under §§ 13-b and 13-d of the Workmen's Compensation Law and § 10-a of the Labor Law." These Rules of the Industrial Council appear below, page 302.*

3. When a physician, in association or in co-partnership with another physician or physicians, or through another physician or physicians as employees or agents, maintains and operates one or more offices principally for the treatment of injured claimants under the Workmen's Compensation Act, he shall apply for a compensation medical bureau license.

4. All reports, except Forms C-104 and C-14 filed by attending physicians and specialists must be verified before a Notary Public or a Commissioner of Deeds, to insure their value as prima facie evidence in a compensation case.

5. All specialists, consultants, etc., shall submit a report of their findings in triplicate, one copy to the Industrial Commissioner, one to the attending physician and one to the employer or insurance carrier. If the specialist acts as attending physician he shall file C-104, C-4, and C-14 reports with the insurance carrier (or with the employer when the carrier is unknown) and with the Industrial Commissioner.

6. All medical reports filed by attending physicians and specialists must contain the authorization certificate number and code letters.

7. When it is necessary for the attending physician to engage the services of a specialist, consultant, or a surgeon, or to provide for physiotherapeutic procedures costing more than twenty-five dollars or to provide for X-ray examinations or special diagnostic laboratory tests costing more than ten dollars, he must secure authorization from the employer or insurance carrier or the Industrial Commissioner.

E.G.—When the total fees for physiotherapeutic treatment approach the sum of $25.00 the physician shall file an additional C-4 report and request authorization as prescribed in Section 13-A-5.

This rule also applies to hospitals, specialists, consultants and surgeons, who are actually engaged to perform such services.

If telephone request for such authorization is made, it should be confirmed by letter. If such authorization is not forthcoming or is not denied within five working days, or if such denial is not justified medically or otherwise, the special services required for the patient's welfare should be proceeded with on the ground that authorization has been unreasonably withheld.

Such authorization is not required in an emergency under the provisions of Section 13-A-5.

8. The authority of an employer for the services of a specialist in excess of a $25.00 fee, applies only to the necessity for such services, but the choice of such specialist is entirely within the jurisdiction of the injured worker.

9. When it is in the interest of the injured employee, and where an X-ray is required and it is impossible to secure the services of a qualified X-ray specialist, the Board of the local County Medical Society may designate a specially qualified individual to take X-ray pictures under the supervision of the attending physician. The attending physician, however, shall render a bill for such service to the employer. This in no way, however, deprives the employer or insurance carrier from having other X-ray pictures taken if they so desire.

10. A physician authorized to treat workmen's compensation cases, when requested to supersede another physician, must, before beginning treatment of such patient, make reasonable effort to communicate with the attending physician to ascertain the patient's condition. The superseding physician must also advise the attending physician of the name of the person who has requested him to assume care of the case and state the reason therefor. If the second physician cannot contact the attending physician, and the claimant's condition requires immediate treatment, the said physician should advise the doctor previously in attendance within 48 hours that he now has the patient in his care. The preceding physician shall supply the succeeding physician with a complete history of the case.

11. In the event of a serious accident requiring immediate emergency medical aid, an ambulance or any physician may be called to give first aid treatment.

12. A registered physiotherapist may treat workmen's compensation cases at his own office or bureau when the case is referred to him by an authorized physician. The authorized physician should, however, give written directions to the physiotherapist as to the kind of treatment to be rendered and the number of treatments to be given. These directions must be given in writing by the physician and shall constitute a part of the record of the case.

13. Bills for X-rays and consultations shall be submitted for payment directly to the employer or carrier by the specialist rendering the service. These services must be authorized in writing by the physician in attendance.

14. Physicians treating claimants in hospitals may secure the signature of claimant for authorization to obtain copies of any necessary hospital records.

15. The physician in attendance in public hospitals must be the judge as to when the "emergency status" of the case has terminated. In case of a dispute the matter shall be referred to the Compensation Board of the Medical Society of the county in which the hospital is located, for immediate decision.

16. Medical inspectors of insurance companies shall be admitted to hospitals or other institutions where injured employees are confined, upon proper identification, for the purpose of complying with Section 13-j.

17. Hospitals and dispensaries shall not operate a medical bureau or clinic for the purpose of rendering medical care and treatment to compensation cases. Hospitals and dispensaries shall not render medical care and treatment to ambulatory compensation cases except for the emergency treatment.

18. No license is required for an employer to operate a first aid station for emergency treatment, but no subsequent treatments are to be renderd by any one, other than a qualified physician on the minimum fee schedule basis.

19. No advertising matter of any nature on compensation work, by or on behalf of authorized physicians, medical bureaus or laboratories shall be permitted.

20. No insurance company or self-insurer may reduce the size of NOTICE TO EMPLOYEES (FORM C-105) which is to be posted in all places of employment covered by the Act, unless such permission is granted on application to the Industrial Commissioner.

21. A physician who testifies at hearings or examines claimants or participates in examinations for evidential material for compensation case hearing purposes only, may accept fees for such services from claimants, employers or carriers.

22. Hospitals shall render bills for board and room accommodations, medical and surgical supplies and nursing facilities. Hospitals may render bills for X-ray, physiotherapeutic, anaesthesia and pathologic services when rendered by or under the supervision of salaried physicians on the staff. The names and qualifications of all physicians and persons rendering services for which charges are made by hospitals must be included in all bills and all medical and X-ray reports shall be promptly filed with the employer or its insurance carrier and the Department of Labor.

Rules Governing Recommending of Authorized Physicians by Insurance Carriers and Employers and the Procedure to be followed by Medical Inspectors and Consultants.

23. The supplying of names of authorized physicians by insurance carriers to their policyholders is in contravention to Section 13, as amended by Chapter 258 of the Laws of 1935. Such policyholders and all employers may secure a list of all authorized physicians in the vicinity of their places of business by applying to the Industrial Commissioner of the Department of Labor.

24. Any physician who acts in the capacity of medical inspector for an insurance carrier or employer in the case of an injured employee under the care of another physician shall not participate in the treatment of said injured employee except in the operation of a rehabilitation clinic or bureau under Section 13-j of the law. Nothing herein contained affects the right of transfer as provided in Section 13-a(3).

25. When a medical examination is had under Section 13-a(4) it shall be by a qualified physician at a place reasonably convenient to the claimant and in the presence of the claimant's physician, if in the latter's opinion his presence is necessary. A duplicate copy of all notices of request for examinations must be sent to the attending physician.

26. No physician designated by an insurance carrier or an employer as a consultant in the case of an injured employee, shall subsequently participate in the medical or surgical care of said injured employee, except with the written consent of the injured employee and his attending physician. Nothing herein contained affects the right of transfer as provided in Section 13-a(3).

Rules Governing the Licensing of and Operation of Compensation Medical Bureaus

27. The character and frequency of accidents, the number of employees in a given plant and the availability of qualified medical care in the immediate vicinity of the place of employment should be considered in relation to the authorization of an employer's compensation medical bureau.

28. The bureau should be located in the industrial plant or in the immediate vicinity.

29. The question of the necessity of the presence of a physician during working hours, or the availability of a physician at stated hours should be determined by an inspection of the plant to ascertain the nature of the hazards and the frequency of accidents.

30. The bureau shall be well-housed with sufficient space, light and air and shall conform to reasonable sanitary requirements. Proper facilities in the form of personnel for assistance in emergencies, instruments, sterilizers, dressings, drugs, shall be available at all times and in amounts proportionate to the size of the plant and the number of employees. Such facilities shall be adequate for more than mere emergency care and for the more severe type of industrial injury.

31. A bureau license may be given for a stated project which, because of the hazards of the project and the frequency of accidents, requires continued medical care and such license shall be for the life of the given project only. In such cases all employees of all subcontractors shall be covered by the license.

32. No license shall be issued to an employer to cover any but his own employees except as indicated in Rule No. 31.

33. First aid stations—No license is required to operate a first-aid station by an employer of labor. Such first-aid or emergency station should be properly equipped for first-aid in accordance with the type of hazard encountered at the particular place of employment.

34. Form C-105, a notice of the rights of an injured employee and the responsibilities of the employer, shall be posted in each compensation medical bureau and first-aid station.

35. All compensation medical bureaus when operated by summer camps and other institutions, wherein such camps and institutions are operating for a profit, shall be charged a license fee of $25.00 per annum for the operation of such medical bureaus which are in operation for six months of the year or less.

STATE OF NEW YORK

DEPARTMENT OF LABOR

INDUSTRIAL COUNCIL

RULES OF THE INDUSTRIAL COUNCIL REGULATING PROCEDURE BEFORE MEDICAL SOCIETIES OR COMPENSATION BOARDS OF MEDICAL SOCIETIES, AND BEFORE THE INDUSTRIAL COUNCIL UNDER §§ 13-b AND 13-d OF THE WORKMEN'S COMPENSATION LAW AND § 10-a OF THE LABOR LAW

Pursuant to Sections 13-b and 13-d of the Workmen's Compensation Law and Section 10-a of the Labor Law the Industrial Council hereby makes and promulgates the following rules:

I—PROCEDURE BEFORE MEDICAL SOCIETIES OR COMPENSATION BOARDS OF MEDICAL SOCIETIES

1. Medical compensation boards must pass upon the application of a physician within 90 days and uotify the Industrial Commissioner and the applicant-physiciau of their action. If such board fails to recommend that a physician be authorized to render medical care under Section 13-b of the Workmen's Compensation Law as amended, the physician may within thirty days after notice of such failure appeal to the Industrial Council as provided in clause (g) of subdivision 4 of Section 10-a of the Labor Law.

2. In auy investigation or hearing before a medical society or board pertaining to the removal of physicians from lists of those authorized to render medical care under the Workmen's Compensation Law, or pertaining to the revocation of the license of a medical bureau, uuder Section 13-d of the Workmen's Compensation Law:

a) The accused physician or medical bureau shall be given twenty days' notice of charges in writing, including a statement setting forth the specific section and subdivisiou of the law violated; the time, date and place of each alleged violation; aud the time, date, and place of the hearing before the medical society or board.

b) Stenographic minutes of such hearing or investigation shall be made and kept.

c) Immaterial, irrelevant and unduly repetitious evidence shall be excluded from the record of any hearing before the local medical society or board, and the technical rules of evidence shall not operate to exclude material evidence of reasonably probative force or of the sort upon which responsible persons are accustomed to rely in serious affairs.

d) A certified copy of the record, together with copies of all exhibits, and a report, recommendation, determination and findings of the local medical society or board shall be submitted to the Industrial Commissioner as promptly as possible, and not more than thirty days after conclusion of its hearings and investigations.

e) The medical society or board which conducted the hearing and investigation shall mail a copy of its report, recommendation, determination, and findings to the accused physician or medical bureau as promptly as possible, and shall permit the accused physician or bureau to consult the pertinent record and exhibits in its possession.

f) The accused physician or medical bureau may, within thirty days after receipt of a copy of the medical society's or board's report, recommendation, determination and findings, file an appeal therefrom with the Industrial Council by written notice of appeal filed with the Council. Copies of this notice of appeal shall be mailed to the medical society or board, and to the Industrial Commissioner.

g) Where it is impossible or impractical for the medical society or board which originally recommended the authorization of a physician to conduct investigations and hearings as required by Section 13-d of the Workmen's Compensation Law, such investigations and hearings shall be conducted by the medical society or board of the county where the authorized physician has removed his office.

II—PROCEDURE BEFORE THE INDUSTRIAL COUNCIL

1. On receipt of notice of appeal the secretary of the Industrial Council shall notify the appellant physician or medical bureau in writing of the time, date, and place of hearing or session at which the Industrial Council will consider the appeal. The secretary shall send a copy of this notice to the Industrial Commissioner and to the interested medical society or board.

2. Appeals or reviews under Section 13-d of the Workmen's Compensation Law shall be heard or considered by a quorum of the Council. For the purposes of such appeals a vice-chairman shall serve as chairman and the Industrial Commissioner shall have no vote. The appellee's case to dismiss the appeal or to affirm the action appealed from shall be presented by the Industrial Commissioner. Within the Council's discretion the medical society may be heard. The appellant physician or medical bureau shall have the right of representation by counsel, or other representative, before the Industrial Council.

3. Stenographic or stenotype minutes of the hearing before the Industrial Council shall be maintained.

4. In the consideration of any review of a determination of a local medical society or board, the Industrial Council shall not permit ex parte hearings.

III—GENERAL POLICY OF PROCEDURAL RULES

In general, administrative adjudication, whether by the local medical society or board, or by the Industrial Council, shall be attended by procedures which assure due notice, adequate opportunity to present and meet evidence and argument, and prompt decision. It shall also be conducted according to established procedures and practices which shall assure adequate protection of rights, benefits or privileges, the impartial conferring of authorized benefits or privileges, and the effectuation of the policies of the statute involved; but without undue formality.

STATE OF NEW YORK

DEPARTMENT OF LABOR

INDUSTRIAL BOARD

RULES AND PROCEDURE

UNDER THE

WORKMEN'S COMPENSATION LAW

(*Effective March* 12, 1942)

Adopted by the Industrial Board of the State of New York, February 27, 1942, pursuant to Chapter 50 of the Laws of 1921.

Rule 1. Physicians' Reports.

(a) When the accident occurred prior to July 1, 1935, or in case of persons injured outside the State subsequent to such date, the employer or insurance carrier shall file promptly with the Industrial Commissioner all reports of all physicians appointed by the employer or insurance carrier to treat the claimant.

(b) When the accident occurred after July 1, 1935, the employer or insurance carrier shall file promptly with the Industrial Commissioner all reports under the provisions of §13-a, subdivisions 1 and 3, or of any examination made by any physician in their service or employ, and in any other instances where the carrier or employer has been permitted or allowed to select a physician for examination or treatment.

The requirement of this paragraph does not apply to the reports of medical inspectors examining compensation cases under the provisions of §13-j (1).

(c) Reports by authorized physicians under §13-a, subdivisions 4 and 5, shall conform with the rules and procedure established by the Industrial Commissioner.

Rule 2. Hospital Records and Reports.

All hospital or medical reports in any pending claim for compensation or true copies thereof coming into the possession of the employer or insurance carrier shall be filed with the Industrial Commissioner or Board upon the order of the Board.

When directed by a Member of the Industrial Board or a Referee, the employer or carrier shall subpoena hospital records and produce same at a hearing.

Rule 3. Original Hearings before Referees.

Original hearings in all claims for compensation except as herein otherwise provided shall be held before a Referee.

Rule 4. Decision by Referees.

(a) In controverted claims the Referee shall make a brief summary of the decision upon the contested points. This decision may be given by an oral statement of findings upon the essential points, which statement shall be entered upon the stenographic minutes of the hearings or may be in a brief written and signed statement which shall be filed with the papers in the record.

(b) The Referee shall in every claim where the disability exceeds seven days make a ruling as to whether or not an accident has been established and in every claim involving disability less than seven days, the Referee shall make such a finding where possible to do so on the evidence before him. Any finding so made shall be incorporated in the notice of his decision.

(c) In claims determined by the Board to come under §25-a the Referee shall take all testimony and develop the record without making any decision or recommendation, and thereafter refer the completed record to the Industrial Board for decision, in accordance with the provisions of said section.

(d) In claims where a physician has failed to file reports in accordance with the requirements of §13-a, subdivision 4, the Referee after taking all testimony on such point, may when he finds it to be in the interest of justice to do so, excuse such failure, stating the reasons therefor.

(e) In claims where the carrier has raised the question of failure to file a claim within the one year statutory period, the Referee after taking all testimony on such point, and permitting the parties in interest to make any statement or argument on such issue, shall refer the completed record, with recommendation thereon, to the Board for decision. The Board shall rule on the question of excusing such failure and extending the time in which to file the claim to a date within the two year statutory period on such record without further hearing.

Rule 5. Filing of Notice and Reports.

Upon the initial hearing of a claim for compensation, the Referee shall examine the file. He shall determine whether the employer and carrier have complied with §§25 and 110 of the Workmen's Compensation Law. If it appears that the employer or carrier has failed to comply with the requirements of such sections relative to filing with the Industrial Commissioner of required reports and notices, he shall determine in each instance whether or not such failure to comply is excusable and take appropriate action thereon.

In every instance, except where compensation payments have been made, the Referee shall make certain that a claim for compensation is filed, or if no claim has been filed, advise the claimant as to his rights.

Rule 6. Failure of Employer and Carrier to make Reports and file Notices.

Where it appears that the employer has failed to report an accident or that the insurance carrier having in its possession a report of accident has failed to forward such report to the Commissioner and it appears that such failure by the employer or insurance carrier has been without justification, the Referee shall report the matter to the Industrial Commissioner; and where it shall appear that the employer or insurance carrier has failed to pay compensation, or to notify the Commissioner that it intends to controvert a claim or has neglected to perform any other act required by law, the Referee shall refer the matter to the Commissioner or the Board, as may be indicated.

Rule 7. Hearings.

(a) Referees' Calendars.
Claims scheduled for hearings by Referees shall appear on appropriate calendars as may from time to time be established by the Industrial Board.

(b) Industrial Board Calendars.
Industrial Board hearings shall be appointed for and held at such time and at such places within the State as the Board may from time to time direct to meet the convenience and requirements of the several districts in the State.

Rule 8. Notice of Hearings.

All notices of hearings upon any calendar shall specifically state the purpose of the hearing and any evidence to be produced by the parties. Notice shall be mailed to the claimant, the employer and the insurance carrier not less than eight days before the date specified in the notice of hearing. In the discretion of the presiding Member of the Board or Referee any issue in a case may be considered and passed upon though not specifically indicated in the notice of hearing if the speedy administration of justice without prejudice to any party will thereby be substantially served. Under exceptional circumstances, the herein required notice of an adjourned hearing may be dispensed with by the Referee on consent of the parties.

Rule 9. Conduct of Hearings.

Every hearing upon a claim for compensation shall be conducted in an orderly manner, all witnesses testifying under oath (or by affirmation), and a record of the proceedings shall be made and kept. The hearings shall be conducted in such manner as to ascertain the substantial rights of the parties, and the Referee may examine the claimant and his witnesses and cross-examine the employer or carrier's witnesses. The presiding Member of the Board or Referee shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure.

Rule 10. Adjournment of Hearings.

A. FOR NON-APPEARANCE OF CLAIMANT

1. In all claims where a claimant or his representative fails to appear at the first hearing, the Referee shall at the hearing check the address used in the department notice of hearing with the carrier's or employer's address for the claimant. If the address used in the notice appears to be in error, that fact and the correct address shall be noted in the record.

2. UNCONTROVERTED CLAIMS. If at the first hearing the claimant or his representative fails to appear, the hearing shall be adjourned, except that if there be in the file a claim and an employer's report (C-3 and C-2), the case may be decided at the first hearing if the Referee is satisfied that the information in those reports is a sufficient basis therefor. In the notice to claimant for the second hearing he shall be informed that the second hearing is being held because of his failure to appear at the first, and that if he or his representative again fails to appear, the case may be decided in his absence. At this hearing, if the claimant or his representative again fails to appear, the Referee shall then proceed to make a decision, unless it appears to him that there is essential reason for further adjournment, which reason shall be noted in the record.

3. CONTROVERTED CLAIMS. (a) If at the first hearing, the claimant or his representative fails to appear, the hearing shall be adjourned. In the notice

of such hearing to the claimant, he shall be informed that the second hearing is being held because of his failure to appear at the first, and that it is important that he or his representative should be present at the adjourned hearing. If claimant or his representative fails to appear at the second hearing, the hearing shall again be adjourned and the folder referred to the Director of the Division of Compensation for investigation as to cause of his non-appearance. At the third hearing, if the claimant or his representative again fails to appear, the Referee shall then proceed to make a decision unless it appears to him that there is sufficient reason for further adjournment, which reason shall be noted on the record.

(b) If the reports and documents in a claim appearing on a Referee's calendar clearly indicate that the claim is one not falling within the jurisdiction of New York State, and the claimant is not present, the Referee may disallow the claim for lack of jurisdiction at the first hearing, and shall state his reasons for his action.

B. FOR REASONS OTHER THAN NON-APPEARANCE OF CLAIMANT

Referees shall use their best judgment as to when and how often it is necessary to adjourn hearings in order to secure all evidence that is necessary or to be fair to all parties in interest. But since adjournments necessarily delay decisions, Referees should always make clear to parties the reason and purpose of each adjournment and press them to make sure to present all that is needed at the next hearing.

If there is an attending physician's verified report in the record, and the carrier or employer desires to produce the doctor for cross-examination, the Referee shall grant an adjournment for such purpose. If the doctor is not produced at such adjourned hearing, a further adjournment shall be granted only if the Referee is satisfied that there is sufficient excuse for the doctor's non-appearance, which excuse shall be noted in the record, and conditioned upon the carrier issuing a subpoena for the attendance of the doctor at the next hearing. If such adjournment be granted and the doctor does not appear, the Referee may proceed with the case on the strength of the evidence in the verified report of the physician. Where the employer or carrier has served a subpoena and the doctor does not appear, the invoking of any court action for enforcement of this subpoena shall be the obligation of the carrier or employer.

Rule 11. Physical Examination.

(a) Physical examination provided for by §19 of the Workmen's Compensation Law shall be made only by a physician employed or designated by the Department. The claimant, employer or carrier, may each have a physician present at such examination. Reports of examination by physicians of the Department shall be duly verified. A claimant who refuses to submit to physical examination, as required by §19 of the Workmen's Compensation Law, may subject himself to suspension of the rights to prosecute his claim for compensation for the period of such refusal.

(b) When a physician has been designated in accordance with the provisions of §13, subdivision (d), to examine the claimant and report thereon, the claimant shall be given reasonable notice by mail of the time and place where he is to appear for such examinations found to be required. At such examinations, neither the claimant, employer or carrier, or the Department shall have a representative present, except that the claimant may be accompanied by a lay member of his family. In the judgment and option of such examining physician, however, such person may, when required, be excluded from the examination.

Reports of examination of such examining physicians shall be sworn to,

and copies in triplicate promptly sent to the Department. A copy thereof shall be furnished by the Department to each of the parties. The original of such report shall at a hearing be made a part of the case record by admitting it in evidence and any party desiring shall be given the opportunity to question such physician on the contents of his report and relative thereto. The fee for appearance at a hearing of such physician for testimony on such report shall be paid by the employer or carrier in an amount to be fixed by the Industrial Board.

A claimant who refuses to submit to such physical examination as the Board may direct and require under the provisions of the said §13, subdivision (d), may subject himself to suspension of the right to prosecute his claim for compensation for the period of such refusal, or the loss of payment of any compensation for any period during which he has so refused to submit to such examination.

(c) When the employer or carrier desires the claimant to submit to an examination by a physician chosen by the employer or carrier, under the provisions of §13-a, subdivision 4, reasonable notice of the request for such examination shall be given in an appropriate manner by the employer or carrier to the physician rendering treatment to the claimant and submitting the report on which the examination demand is made. If the claimant is not confined to a hospital, such notice shall also be given to him and if he is represented, to his attorney or licensed representative. The place of such examination shall be fixed so as to be reasonably convenient to the claimant and his physician. An examination of the claimant shall not be made without the claimant's physician being present, unless such right is waived. No representative of the parties other than the physicians of each shall be present at such examination, except by mutual consent of the parties. Written report of such examination, duly sworn to, shall be promptly filed with the Department by the employer or carrier.

A claimant who refuses to submit to such examination provided under §13-a, subdivision 4, shall unless the Board finds the refusal to do so to be reasonable under the circumstances, bar himself from recovering compensation for any period during which he has so refused to submit to the examination requested.

Rule 12. Original Hearings before Industrial Board.

Within the discretion of the Industrial Board, an original hearing may be held by a Member of the Industrial Board.

Rule 13. Certification of Questions to the Industrial Board.

A Referee after hearing all the testimony on a claim for compensation, which presents a novel question of law or one involving a question of public policy or jurisdiction or a question of equal importance, may before rendering his decision certify such question to the Industrial Board. The Referee shall submit a statement of his findings of fact on the controverted questions of fact and the question presented by the record for decision.

If any hearing on such question is deemed necessary, it may be held by a Board Member, but the determination of the certified question shall be after review of the record and vote thereon by the full Board Membership.

Rule 14. Application for Review.

Application for review by the Industrial Board of decisions of Referees in granting or denying an award, or a review of any other action taken by a Referee, shall be made in writing to the Industrial Board and shall state the

specific grounds for such application. It may be accompanied by a reference to or excerpt from the official minutes or such part thereof as is relevant to the issues raised. Such reviews shall be had and determined upon the evidence and testimony in the record, unless otherwise determined by the Industrial Board. Such application for review shall be filed within twenty days after filing of the decision of the Referee which is sought to be reviewed.

The Industrial Board in its discretion may deny such application without further hearing or may direct that a hearing be held before the Industrial Board for argument on the application. Upon such review the Board may affirm, reverse or modify any decision or award of a Referee as the law and the facts may require or may remand the case to a Referee to take further proof or to further proceed with the case as the Board may direct; or may continue the case for further consideration of the Board, as may be in the interest of justice.

Rule 15. Application for Rehearing.

Application may be made by any party in interest for rehearing or reopening of a claim for compensation. Such application must indicate that—

(a) Certain material evidence not available for presentation before the Board or the Referee at the time of hearing is now available, or

(b) Proof of a change in condition material to the issue involved, or

(c) It would be in the interest of justice.

Such applications must be made within a reasonable time after the applicant has had knowledge of the facts constituting the grounds upon which such application is made. The Industrial Board may in its discretion deny such application without a hearing thereon or may require the applicant to submit further proof before finally passing upon said application.

Allegations as to newly discovered evidence as basis for such application must be substantiated by presentation of supporting affidavits.

The data to be submitted in connection with an allegation that there has been "a change in condition", as required by subdivision (b) of this Rule must, except as hereinafter provided, be in the form of a verified medical report prepared as the result of an examination held after the expiration of a substantial period subsequent to the close of the case. This report must clearly state the objective findings. If such an examination cannot be had, a rehearing may be granted upon the presentation of information in affidavit form, which would indicate that a material change in the degree of disability has taken place subsequent to the closing of the case.

If the Board in its discretion grants the application and orders reopening and rehearing, the case may be referred to a Board Member or to a Referee for the taking of testimony or evidence and for such further consideration as appears warranted.

When a case or any issue therein is so referred to the Referee he shall thereupon receive such testimony or proofs as are specified in the order of the Board and he may then consider the case in the light of the evidence previously introduced, together with that presented at the rehearing and may then render a decision upon the completed testimony and evidence in the case, unless the order of submission limited the Referee to the taking of testimony and the returning of the transcribed completed record to the Board for review and decision.

Rule 16. Notice of Application for Review or Rehearing.

(a) When application is made by the employer, carrier or Special Fund for Reopened Cases for further consideration of a claim under Rules 14 and 15,

the applicant shall immediately notify the claimant of such action. The notice shall be on a form approved by the Industrial Commissioner.

If the claimant has not been represented by an attorney or licensed representative, a copy of the application shall be sent to him by mail by the applicant and accompanying such notice.

If the claimant is represented by an attorney or licensed representative, the employer, carrier or Special Fund for Reopened Cases may dispense with the sending of the copy of the application to the claimant, but such copy of application shall be sent by mail to the claimant's attorney or licensed representative upon the same day it is sent to the Department.

(b) Where the claimant is represented in making such application by an attorney or licensed representative, such attorney or licensed representative shall send to the employer, carrier or Special Fund for Reopened Cases by mail a copy of the application made on the same day it is sent to this Department.

Rule 17. Appeal Bars Review or Rehearing.

In every case in which a party in interest has made an application for review or rehearing as provided by Rules 14 and 15 and has in addition filed notice of appeal as prescribed by §23 of the Workmen's Compensation Law, the said application for review or rehearing shall be denied and the case shall be submitted to the Attorney General for the preparation of formal findings of fact and ruling of law.

Rule 18. Fees.

When a claimant is represented at a hearing, a Member of the Board or a Referee shall determine in what capacity such representative appears and whether he is rendering his service wholly gratuitously to the claimant. Unless such service is rendered gratuitously, after an award for compensation is made to the claimant, the Member of the Board or Referee hearing such case shall fix a sum as allowance for such service, as follows:

(a) An application shall be filed in each instance where a fee is requested, upon a form presented by the Industrial Commissioner, except where the case is closed at the first hearing or where the amount of the fee requested does not exceed $25.00, in which case the Referee shall require the attorney or licensed representative to make an oral statement of his services rendered, unless in his discretion the Referee requires the filing of the said application.

(b) When the claimant is represented by an attorney, the Member of the Board or Referee shall in every case approve a fee in an amount commensurate with the service rendered and having due regard for the financial status of the claimant.

(c) When the claimant is represented by a person other than an attorney, the Member of the Board or Referee shall fix a nominal fee unless the Member of the Board or Referee is satisfied that such representative has rendered substantial assistance to the claimant, in which case an allowance shall be made in an amount commensurate with such service, having due regard for the financial status of the claimant.

In no case shall the fee be based solely on the amount of the award.

Rule 19. Record upon Appeal; Contents and Service.

(a) On an appeal taken under §23 of the Workmen's Compensation Law

a list of all papers, exhibits and the testimony bearing on the claim shall be served with all copies of the findings.

(b) The appellant may include all such papers, exhibits and testimony in the proposed case and printed case on appeal, or may serve on the Board and on any respondent who may have appeared by attorney, a notice specifying all the issues he intends to review on the appeal, together with a list of the papers, exhibits and testimony he intends to print as his proposed case and any statement of facts he proposes to insert instead of all or part of the testimony. This list need include only matter that refers to the issues to be reviewed.

(c) Upon receipt of such notice and list, the Board and the respondent within fifteen days thereafter shall serve proposed additions to the list and modifications concerning the statement of facts or shall serve a notice that it will propose none.

(d) The appellant's proposed case shall contain all statements, papers and evidence specified in his list served by him, and all the additions and modifications proposed by the respondent and by the Board or, in the alternative, all papers, exhibits and testimony bearing on the claim. Two printed copies of the proposed case shall be served on the Board, which shall return one copy with its amendments and corrections indicated thereon, or on an accompanying paper. The Board and the respondent may propose amendments or corrections to the proposed case.

(e) In case a shortened form of record is printed, it shall contain the appellant's specification of issues and a stipulation that the record as printed contains all the papers, exhibits and testimony material to the issues on the appeal. In the event of dispute as to the contents of such record, the matter shall appear upon a Board Calendar for settlement of the record. All parties in interest shall be notified of such hearing, including the office of the Attorney General.

(f) The specifications of issues must be served within thirty days after the mailing of the conclusions of fact and law to the parties. The proposed case on appeal must be served within fifteen days after the mailing of the proposed additions, modifications of notice prescribed in paragraph (c) above. The printed record must be served within twenty days after the date of the mailing of the proposed case to the appellant by the Board.

(g) Where no specifications of issues nor list as provided in paragraph (b) shall have been served, the proposed case must be served within thirty days after the service of the findings (or thirty-three days if the findings shall have been served by mail), and the printed case must be served within twenty days after service of amendments to the proposed case or of notice that the respondent will serve no amendments.

Rule 20. Granting Licenses to Representatives of Claimants.

(a) All persons, firms or corporations, or their employees, other than attorneys and counsellors-at-law, desiring to represent claimants at any hearing, investigation or inquiry relative to a claim for compensation shall make application for a license to the Industrial Commissioner upon a printed form to be furnished by the Industrial Commissioner.

(b) Applicants for licenses must furnish satisfactory proof that they can speak and write the English language and have sufficient knowledge of the provisions of the Workmen's Compensation Law to enable them to properly

and efficiently protect the interests of claimants. Each such applicant shall also present satisfactory proof of having maintained a permanent residence within the State and that he resided therein for at least one year prior to the date of application.

(c) A license shall be issued to a representative of a charitable or welfare organization, a labor union, or any bona fide organization of employees having a regular dues-paying membership and officers, organized under a constitution relative to its objects, and regulated by by-laws prescribing the qualifications and requirements of membership.

(d) Upon satisfactory proof to the Industrial Board of the authenticity of such an organization and upon certification of the president or other responsible executive officer thereof that a designated person, firm or corporation is employed or authorized to represent its members, the Industrial Board shall recommend to the Industrial Commissioner that a license be issued to such person, firm or corporation. Such license shall issue without charge.

(e) Upon certification of any organization or association, referred to in paragraphs (c) and (d) of this Rule, whose representative has been licensed to appear at hearings for claimants, that such person, firm or corporation no longer is employed or authorized to act for such organization or association to represent its members, such license theretofore issued to its representative shall be revoked.

(f) Applicants for licenses with fee must state their former activities or connections and give the names and addresses of former employers for a period of five years preceding the date of application for license. If not employed for such period, and if attending school or college for all or any part of that period, the name and address of such school or college and the names of the teachers or instructors must be given.

(g) If such applicants were formerly engaged in business for themselves they shall furnish the names and addresses of three reputable business concerns. If they formerly pursued a profession other than attorney and counsellor-at-law, they shall furnish the names and addresses of three reputable persons, firms or corporations for whom they rendered professional services.

(h) Oral examinations of applicants for licenses with fee shall be held by the Industrial Board or by an examining committee designated by the Board for the purpose of determining the character and fitness of each applicant. Failure to appear and undertake examination on a date appointed, and for which notification has been sent to the applicant by mail at his last known residence not less than ten days in advance of such date shall be deemed sufficient ground for rejection of the application. The Board, however, may excuse the failure to appear when the circumstances warrant.

(i) After rejection by the Industrial Board of an application for a license such applicant may not again apply until the expiration of six months from the date on which the prior action of the Industrial Board was taken.

(j) The names of all persons, firms or corporations applying for licenses and any renewal thereof, shall be forwarded to the Industrial Commissioner with information of the action of the Industrial Board upon their respective applications. The Board, may, however, limit any such action in recommending for license with fee to require the applicant to show to the satisfaction of the Industrial Commissioner that he has established a permanent office for conduct of his business, as a condition precedent to issuance of any such license.

(k) Upon the recommendation of the Industrial Board, the Industrial Commissioner shall issue a license.

(l) The license fee to represent individual claimants shall be fifty dollars ($50) per year, payable to the Industrial Commissioner. Licenses issued on any date from July first to September thirtieth, inclusive, shall require payment of the full annual license fee of fifty dollars ($50). Licenses issued on any date from October first to December thirty-first, inclusive, shall require payment of a proportionate fee of thirty-seven and one-half dollars ($37.50). Licenses issued on any date from January first to March thirty-first, inclusive, shall require payment of a proportionate fee of twenty-five dollars ($25). Licenses issued on any date from April first to June thirtieth, inclusive, shall require payment of a proportionate fee of twelve and one-half dollars ($12.50).

(m) All licenses shall expire on June thirtieth of each year. Licensee shall be required to make application to the Industrial Commissioner for each annual license renewal upon a printed form approved by the Industrial Board and to be furnished the licensee upon application to the Industrial Commissioner. Such annual license renewal application properly executed by the licensee must be filed with the Industrial Commissioner on or before the first day of June preceding the license year for which the application is being made. Each such annual license renewal application so submitted by a licensee previously licensed to represent claimants with fee must be accompanied by cash, or a form of remittance acceptable to and made payable to the order of the Industrial Commissioner, in the amount of fifty dollars ($50), to be applied in payment of the annual license fee, if such license renewal is issued. The Industrial Commissioner shall not refer to the Industrial Board for consideration of recommendation regarding renewal of license the renewal application of any applicant who has not complied with the aforesaid requirements. If for any reason the Industrial Board does not recommend the issuance of any such renewal license with fee, the amount of payment accompanying the renewal application shall be repaid by the Industrial Commissioner to such applicant. Renewal applications received after the first of June of each year shall be regarded as new applications and be subject to the rules applicable thereto. Prior to the first day of July of each year, the Industrial Commissioner shall notify any licensee who has failed to file annual renewal application, in accordance with provisions herein, and whose license has not been renewed, of his disqualification to represent claimants after July first of such current year at any hearing, investigation, or inquiry relative to a claim for compensation. A list showing the names of all prior licensees to whom annual renewal licenses have not been issued shall be promptly furnished to the Industrial Board and the Referees.

(n) Licensees shall furnish to the Industrial Commissioner the names of all licensed employees who are regularly employed to appear at any hearing, investigation or inquiry relative to claims for compensation, and of any change therein, at such time as the change occurs.

(o) An identification card shall be issued by the Industrial Commissioner to all persons licensed to represent claimants at compensation hearings. All licensees shall be required to present such identification card at hearings for inspection by the Referees.

A fee paying licensee is prohibited from advertising except that he may place on his stationery, business card and office premises the following single statement:

> "Licensed to represent claimants in workmen's compensation proceedings, New York License No. ————————."

or as an alternative–

"Licensed Workmen's Compensation Representative. New York License No. ————————."

(p) Only attorneys and counsellors-at-law and licensees shall be permitted to participate on behalf of claimant in the conduct of any hearing on a claim for compensation.

(q) Members of the family or friends of claimants appearing with them at hearings may be permitted to make any statement for the record of a hearing in the capacity of witness, and under such circumstances are not required to have a license. Such persons, however, are not permitted to participate in hearings in any manner whatsoever, if their appearance involves the charge of a fee to the claimant.

(r) Inability or failure of licensees to comport themselves with dignity and decorum shall be considered by the Industrial Board as sufficient ground for recommending to the Industrial Commissioner that the license be revoked.

(s) The Board may in exercise of discretion, when the conditions appear to so warrant, limit the number of licenses to represent claimants with fee to be issued and outstanding, or may suspend for a given and stated period the receipt of applications for license to represent claimants with fee.

(t) The Industrial Board may in its discretion suspend or modify the application of any provision of this rule.

Rule 21. Granting Licenses to Representatives of Self-Insurers.

(a) All persons, firms or corporations other than attorneys and counsellors at law engaged in the business of soliciting self-insurers as clients and representing self-insurers at any hearing, investigation or inquiry relative to a claim for compensation shall make application for a license to the Industrial Commissioner upon a printed form to be furnished by the Industrial Commissioner.

(b) 1. Any individual making such application shall present satisfactory proof of having maintained a permanent residence within the State and that he resided therein for at least one year prior to the date of the application.
2. Any corporation making such application must be a domestic corporation.

(c) Applicants for licenses shall furnish to the Board five references consisting of reputable business concerns or banks.

(d) Applicants for licenses shall furnish to the Board the names of all persons other than the licensee, authorized to represent the licensee at any hearing, investigation or inquiry relative to claims for compensation.

(e) Oral examinations of applicants shall be made by the Industrial Board or by an examining committee designated by the Board for the purpose of determining the character and fitness of the applicant.

(f) Licenses shall be issued to the legally responsible entity, i.e., to the person, firm or corporation so engaged, and not to any individual representative or employee thereof unless otherwise specifically required by the Industrial Board.

(g) A person, firm or corporation so licensed shall furnish his or its representatives with credentials of authority which shall be properly signed and certified to by such person, or the executive head of such firm or corporation.

(h) Licensees shall notify the Board of any change in the list of authorized representatives at such times as changes occur.

(i) No person, other than an attorney at law, a regular employee of a self-insured employer, a licensee or authorized representative of the licensee, shall be permitted to participate, on behalf of the self-insured employer, in the conduct of any hearing upon a claim for compensation, except in an advisory capacity, or as a witness.

(j) The license fee shall be fifty dollars ($50) per year, payable to the Industrial Commissioner. All licenses shall expire and be renewable on July first of each year. Licenses issued on any date from July first to September thirtieth, inclusive, shall require payment of the full annual license fee of fifty dollars ($50). Licenses issued on any date from October first to December thirty-first, inclusive, shall require payment of a proportionate fee of thirty-seven and one-half dollars ($37.50). Licenses issued on any date from January first to March thirty-first, inclusive, shall require payment of a proportionate fee of twenty-five dollars ($25). Licenses issued on any date from April first to June thirtieth, inclusive, shall require payment of a proportionate fee of twelve and one-half dollars ($12.50).

(k) All licenses shall expire on June thirtieth of each year. Licensees shall be required to make application to the Industrial Board for each annual license renewal upon a printed form approved by said Board and to be furnished to the licensee upon application to the Industrial Commissioner. As promptly as possible after the expiration of the license year, the Industrial Commissioner shall notify any licensee whose license has not been renewed of his disqualification after July first of such current year to engage in the business of soliciting self-insurers as clients and representing self-insurers at any hearing, investigation or inquiry, relative to a claim for compensation. Applications received after the close of the license year shall be regarded as new applications and be subject to the rules applicable thereto.

(l) A bond approved as to form and sufficiency by the Industrial Commissioner shall be required. The amount of such bond shall be one thousand dollars ($1,000). It shall be written for the term for which the license is issued and shall be renewed in accordance with each renewal license granted.

(m) The names of all persons, firms or corporations applying for licenses, and any renewal thereof, shall be forwarded to the Industrial Commissioner with information of the action of the Industrial Board upon their respective applications.

(n) Upon the recommendation of the Industrial Board, the Industrial Commissioner shall issue a license upon the payment of the license fee and the filing of the required bond.

(o) Upon rejection by the Industrial Board of an application for a license, applicant may not present a new application until the expiration of six months from the date on which the prior action of the Board was taken.

Rule 22. Computation of Interest on Awards.

(a) When an award is made by the Referee, and an application for review is filed, if the application for review is denied, or the award is affirmed by the Board upon review of the original record, interest shall be computed from thirty days after the date of filing of the award made by the Referee in the Department until date of payment of the award.

(b) When an award is appealed and subsequently is affirmed by the Appellate Division or the Court of Appeals, interest shall be computed from the date on which the notice of award was filed until the day on which award was paid.

(c) When an award has been made and appeal taken which is later withdrawn, interest shall be computed from thirty days after the date of filing of the award in the Department, until date of payment of the award.

Rule 23.

The Industrial Board may in its discretion suspend or modify the application of any of these rules.

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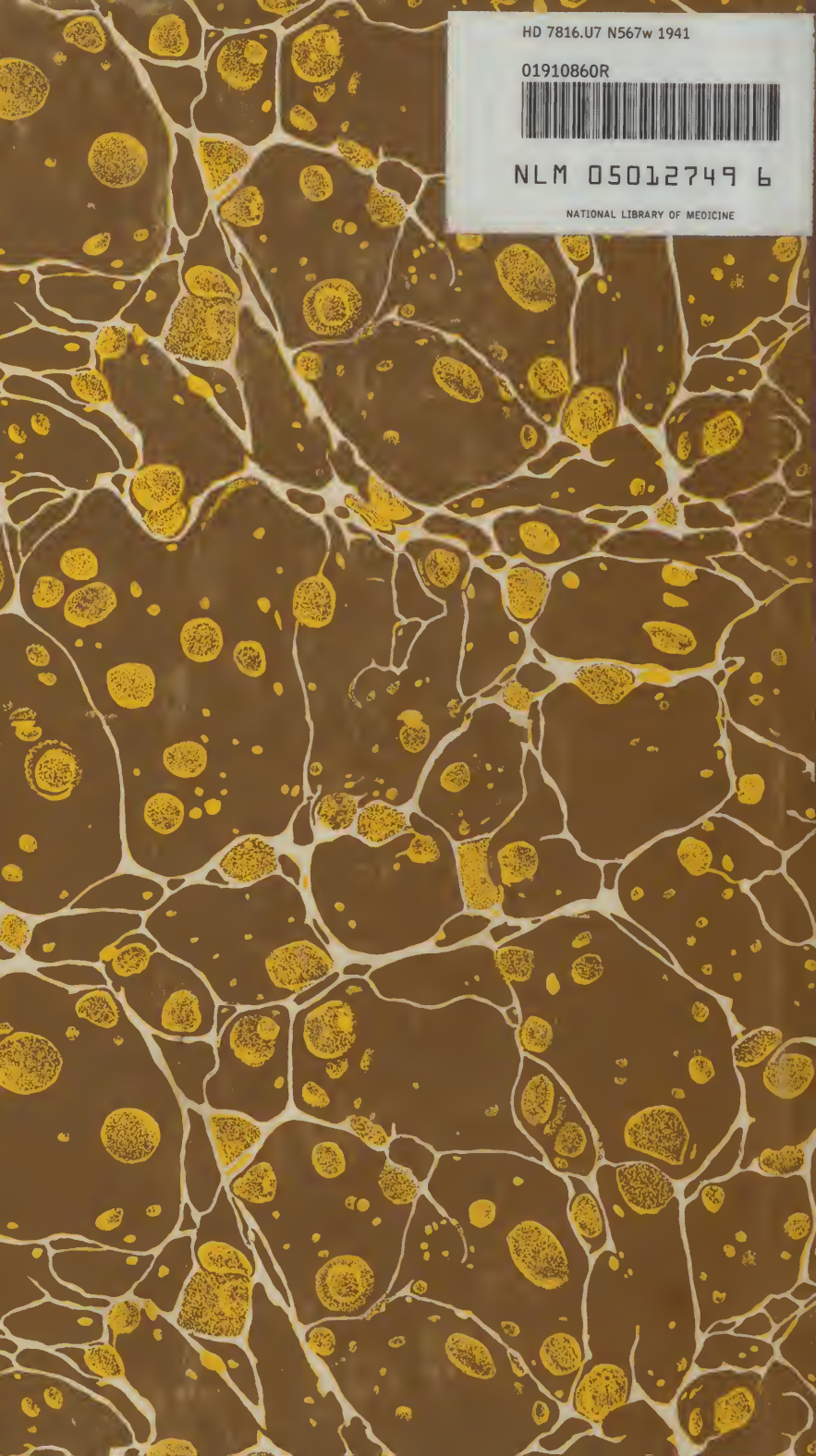
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